Supreme Court, U.S.
FILED

(1)

No. 02- 02 765 NOV 15 2002

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

STATE OF CALIFORNIA, CALIFORNIA HIGHWAY PATROL, DWIGHT HELMICK, and EDWARD GOMEZ,

Petitioners,

v.

JEFF D. PAIGE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
SILVIA M. DIAZ
Supervising Deputy Attorney General
300 South Spring Street
Suite 500
Los Angeles, CA 90013

JOEL M. COHN
Counsel of Record
CHARLES L. WARREN
W. RANDOLPH TESLIK, P.C.
AKIN GUMP STRAUSS HAUER & FELD LLP
Robert S. Strauss Building
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 887-4000

WILLIAM A. NORRIS
MICHAEL C. SMALL
AKIN GUMP STRAUSS HAUER & FELD LLP
2029 Century Park East
Suite 2400
Los Angeles, CA 90067

Attorneys for Petitioners

177321

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

88 pp

QUESTIONS PRESENTED

1. In a disparate impact case brought under Title VII of the Civil Rights Act of 1964, may a plaintiff establish liability by using statistical methods that combine data from events that occurred in the "pre-liability period" (that is, the period for which claims would be time-barred under this Court's decisions in *National Railroad Passenger Corp. v. Morgan* and *United Air Lines, Inc. v. Evans*) with data from events that occurred within the liability period?

2. When an employer uses significantly different promotional tests for the significantly different supervisory ranks in its workforce, may a plaintiff prove disparate impact using a method of statistical aggregation that compares a single pool of all test applicants for all positions with a single pool of all successful promotees?

3. May a plaintiff prove that a challenged employment practice creates a disparate impact using statistical analyses that lump all minority groups into a single "non-white" category for comparison against whites?

LIST OF PARTIES

Respondent, Jeffrey D. Paige, is representative of a class of all past, present, and future non-white sworn employees in the California Highway Patrol who have been, are, or will be discriminated against with regard to the terms and conditions of their employment because of their race, including the denial of job assignments, transfers, promotions and other benefits of an effective affirmative action program as the result of the operation of current practices.

TABLE OF CONTENTS

	Page
Questions Presented.	i
List of Parties	ii
Table of Contents	iii
Table of Cited Authorities	vi
Table of Appendices	x
Opinions Below	1
Statement of Jurisdiction	1
Pertinent Statutory Provisions	1
Introduction	2
Statement of the Case	5
A. Background	5
B. *Paige I*	6
C. Proceedings On Remand From *Paige I*	7
D. *Paige II*	10
Reasons for Granting the Petition	13

Contents

		Page
I.	The Ninth Circuit's Apparently Unprecedented Holding That Plaintiffs May Use Time-Barred Data To Prove Disparate Impact Creates A Broadly Applicable Rule That Conflicts With This Court's Decisions And The Decisions Of Other Courts Of Appeals	13
	A. Assessing Disparate Impact Using Data From Time-Barred Examinations Conflicts With This Court's Decisions Refusing To Give Legal Effect To Employment Decisions That Were Not Timely Challenged	13
	B. The Ninth Circuit's Decision Conflicts With *Ste. Marie v. Eastern Railroad Ass'n*, 650 F.2d 395 (2d Cir. 1981) (Friendly, J.)	19
II.	The Ninth Circuit's Holding Permitting The Aggregation Of Data From Different Examinations And Ranks Defies The Language Of Title VII And Logic Of This Court's Precedents, Creates A Circuit Conflict, And Is Statistically Indefensible	21

Contents

Page

III. The Ninth Circuit's Holding Permitting The Indiscriminate Aggregation Of Data From Different Minority Groups Runs Counter To This Court's Jurisprudence And Presents Yet Another Obstacle To The Proper Adjudication Of Title VII Claims 27

Conclusion 29

TABLE OF CITED AUTHORITIES

Page

Cases:

Bouman v. Block,
940 F.2d 1211 (9th Cir. 1991) 14, 21

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 28

Cooper v. Southern Co.,
205 F.R.D. 596 (N.D. Ga. 2001) 26

Cox v. City of Memphis,
230 F.3d 199 (6th Cir. 2000) 21

Csicseri v. Bowsher,
862 F. Supp. 547 (D.D.C. 1994) 25-26

Delaware State College v. Ricks,
449 U.S. 250 (1980) 15, 16, 17, 18

Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship and Training Comm.,
833 F.2d 1334 (9th Cir. 1987) 15, 25

Griggs v. Duke Power Co.,
401 U.S. 424 (1971) 4

Harris v. City of New York,
186 F.3d 243 (2d Cir. 1999) 20-21

Cited Authorities

Page

Hazelwood School Dist. v. United States,
433 U.S. 299 (1977) ..... *passim*

International Bhd. of Teamsters v. United States,
431 U.S. 324 (1977) 5, 16

Maddox v. Claytor,
764 F.2d 1539 (11th Cir. 1985) 25

Morgan v. National R.R. Passenger Corp.,
232 F.3d 1008 (9th Cir. 2000), *aff'd in part & rev'd in part*, 122 S. Ct. 2061 (2002) 11

National R.R. Passenger Corp. v. Morgan,
122 S. Ct. 2061 (2002) ..... *passim*

Pouncy v. Prudential Ins. Co.,
499 F. Supp. 427 (S.D.Tex. 1980), *aff'd*,
668 F.2d 795 (5th Cir. 1982) 20

Simmons v. City of Kansas City,
No. CIV.A.88-2603-0, 1992 WL. 403096
(D.Kan. Dec.7, 1992) 26

Ste. Marie v. Eastern R.R. Ass'n,
650 F.2d 395 (2d Cir. 1981) ..... i, 17-18, 19, 20

United Air Lines v. Evans, Inc.,
431 U.S. 553 (1977) ..... *passim*

Cited Authorities

Page

Valentino v. United States Postal Serv.,
511 F. Supp. 917 (D.D.C. 1981), *aff'd*, 674 F.2d
56 (D.C. Cir. 1982) 26

Wards Cove Packing Co. v. Atonio,
490 U.S. 642 (1989) 2, 3, 21, 22, 23, 26

Wygant v. Jackson Bd. of Educ.,
476 U.S. 267 (1986) 28

Statutes, Regulations, and Court Rules:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1981 20

42 U.S.C. § 2000e-2(a) 1

42 U.S.C. § 2000e-2(k) 1, 2, 21

Cal. Veh. Code § 2251 5

28 C.F.R. § 50.14 12

Fed. R. Civ. P. 23 6

Cited Authorities

Page

Other Authorities:

Michael O. Finklestein & Bruce Levin, *Statistics for Lawyers* (1990) 25

Kevin Gilmartin & John Claudy, PROC MULTEVENT: Multiple Events Exact Probability Test, Validation Report (1985) 25

Ramona L. Paetzold & Steven L. Willborn, *The Statistics of Discrimination* (1994) 25

TABLE OF APPENDICES

Page

Appendix A — Order And Amended Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed May 31, 2002 And Amended July 18, 2002 And Order Denying Rehearing Dated July 18, 2002 ..... 1a

Appendix B — Material Deleted From Pages 7951 & 7952 Of The Opinion Of The United States Court Of Appeals For The Ninth Circuit Dated And Filed May 31, 2002 ..... 20a

Appendix C — Order Of The United States District Court For The Central District Of California, Western Division Dated And Filed April 12, 2000 ..... 23a

Appendix D — Order Of The United States District Court For The Central District Of California Dated And Filed August 12, 1999 ..... 34a

Petitioners State of California, California Highway Patrol ("CHP"), Dwight Helmick, and Edward Gomez respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended order and opinion of the Ninth Circuit (App. 1a) is reported at 291 F.3d 1141. The pertinent opinions of the district court (App. 23a, 34a) are unreported.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on July 18, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

42 U.S.C. § 2000e-2(a): It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(k): (1)(A) An unlawful employment practice based on disparate impact is established under this title only if – (i) a complaining party demonstrates that a respondent

uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; . . .

42 U.S.C. § 2000e-2(k): (1)(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

INTRODUCTION

At stake in this disparate impact case is the integrity of statistical analysis in litigation pursuant to Title VII of the Civil Rights Act of 1964, as amended. In *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), and *Hazelwood School District v. United States*, 433 U.S. 299 (1977), this Court emphasized that lower courts must rigorously examine the categories of statistical data used to assess whether a specific challenged employment practice actually causes the alleged discrimination. As this Court recognized in rejecting the unjustified use of statistical proxies in *Hazelwood* and the improper grouping of distinct job categories in *Wards Cove*, the wrong legal standards for statistical proof of discrimination undermine the purposes of Title VII by forcing employers into unwarranted and expensive litigation, and encouraging them to adopt racial quotas as a prophylactic against future litigation.

The Ninth Circuit in this case (opinion by Reinhardt, J.) has approved as a matter of law the use of three statistical methods, each of which violates the teachings of this Court's Title VII decisions and also conflicts with the approaches used by other circuits.

First, the Ninth Circuit held that plaintiffs may use time-barred data to make a statistical showing of disparate impact by combining examination results from the "pre-liability period" (that is, results that could not themselves give rise to a claim because they are time-barred) with examination results from within the liability period. In essence, under the Ninth Circuit's holding, time-barred events may serve as the "but for" cause of a finding of disparate impact liability, enabling plaintiffs to prevail even when they cannot prove disparate impact within the liability period. This holding cannot be squared with the command of *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977), that such data should have "no present legal consequences" – an admonition that was reinforced just last Term in *National Railroad Passenger Corp. v. Morgan*, 122 S. Ct. 2061 (2002).

Second, the Ninth Circuit approved the following method of statistical aggregation and analysis: combine into a single pool all exam applicants for all supervisory ranks at issue across multiple years and compare that single pool with a corresponding single pool of successful promotees. This "single pool" method, which takes no account of the differences in the exams given for different ranks and treats all employees as being entirely fungible and assumes they were all available during all of the exams, violates Title VII, is inconsistent with this Court's decision in *Wards Cove*, creates a circuit conflict, and has been roundly criticized by statistical experts. To summarize the problem, although disparate impact litigation must identify the

"particular employment practice" responsible for the alleged discriminatory effect, the Ninth Circuit has authorized a method of proof that muddles together multiple discrete employment practices and job categories, and thus inevitably produces legally unreliable results.

Third, the Ninth Circuit held that, instead of determining the impact of the challenged promotional exams on each minority group separately, plaintiffs could combine all minority groups into a single "non-white" group for the purpose of comparing their performance with whites. However, combining all minorities into a single, undifferentiated group runs afoul of this Court's decisions requiring that differences in the treatment afforded different minority groups not be blurred in evaluating claims of discrimination.

As this Court has recognized, disparate impact analysis may be a useful tool to prevent employment practices that are neutral on their face but operate in a discriminatory manner. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). But by granting plaintiffs a license to gin up the appearance of disparate impact by combining statistical data from multiple selection events without regard to their differences, timeliness, or ability to isolate the causes of any differences in performance, and by combining distinct minority groups without regard to their different performances, the Ninth Circuit has turned the search for discrimination into a game of mathematical manipulation. Because the Ninth Circuit's rulings will significantly affect the nature of the statistical evidence to be presented not only in this case but also in Title VII cases generally, and will remain the law of the Ninth Circuit notwithstanding what happens on remand, this Court should grant review now in order to prevent

further misapplication of statistical methods in this important and frequently litigated aspect of employment discrimination law.[1]

STATEMENT OF THE CASE

A. Background

The career of a peace officer in the CHP begins with being hired as a cadet followed by rigorous training and graduation to an entry level officer position. As required by state statute,[2] the CHP fills all vacancies in its supervisory ranks (sergeant, lieutenant, captain, assistant chief, and deputy chief) from internal promotional candidates, who are permitted to rise only one rank at a time.

To be eligible for promotion, an officer must complete the promotional examination for the rank to which he or she aspires. Because different ranks emphasize different skills and require increasing responsibility, the promotional examinations differ depending on the rank in question. For example, although both the sergeant and lieutenant promotional examinations are comprised of a multiple-choice written test and oral interview, the test questions and interview topics for prospective sergeants

---

1. Although this case involves a claim of disparate impact, the Ninth Circuit's rulings on statistical methodology will have a substantial effect on disparate treatment claims as well because such claims also frequently involve the use of statistical evidence as proof of intentional discrimination. *See International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977). Indeed, that may well happen in this very case, since plaintiffs also filed a disparate treatment claim against the CHP.

2. Cal. Veh. Code § 2251.

differ from those for prospective lieutenants. In the same vein, candidates for the rank of captain do not take a multiple choice written test; instead, their examination consists of an "in basket" exercise and an oral interview. Different still is the examination for assistant chief, which is exclusively oral.

During the time period relevant to this case, the CHP gave the promotional examinations for each rank at roughly two-year intervals. After administering each examination for each rank, the CHP compiled and published an eligibility list ranked in order of the weighted composite score that each promotional candidate achieved on his or her examination. When a vacancy occurred in one of the supervisory ranks, the CHP would fill it by taking the next name in order from the eligibility list for the rank in question. Each eligibility list remained effective until the next promotional examination was administered and a new, superseding list generated.

B. ***Paige I***

This case began more than eight years ago, on January 5, 1994, when Jeff Paige, an African-American CHP lieutenant, filed a class action alleging that the CHP's promotional practices violate Title VII of the Civil Rights Act of 1964, as amended. As relevant here, Paige's suit claimed that "the promotion selection procedures used by the CHP adversely impact, on the basis of race, qualified African American officers." On July 12, 1994, the district court certified a class of incumbent minority CHP officers under Rule 23 of the Federal Rules of Civil Procedure.

On March 29, 1995, the district court granted plaintiffs' motion for partial summary judgment on their claim that the CHP's promotional practices created a disparate impact against

non-white officers in violation of Title VII, and denied defendants' cross-motion for partial summary judgment. Specifically, the court ruled that plaintiffs had established disparate impact through statistical analyses that compared the minority representation in the CHP's supervisory ranks with the minority representation in supervisory positions in law enforcement agencies throughout California as reflected in the 1990 California census. The district court refused to assess disparate impact using the actual pool of employees eligible for promotion – that is, by comparing the percentage of minority officers applying within the CHP for promotion to supervisory positions with the percentage of minority officers selected for supervisory positions.

The CHP appealed, arguing that the district court erred in using an external statistical proxy for the pool of actual applicants. The Ninth Circuit agreed. Because the record contained "no evidence" that any CHP employment practice "deterred non-white, non-supervisory employees from applying for promotion" (thereby justifying use of a measure other than the pool of actual applicants), the Ninth Circuit held that the district court's resort to the external statistical proxy was not justified. *Paige v. State of California, et al.*, No. 95-56669, 1996 U.S. App. LEXIS 33426, at *5 (9th Cir. Dec. 20, 1996) ("*Paige I*"). Accordingly, the court reversed the grant of partial summary judgment and remanded the case to the district court.[3] *Id.* at *7.

C. Proceedings On Remand From *Paige I*

On remand to the district court, the case continued what the Ninth Circuit later described as its "difficult" history. In a

3. At the same time, the court affirmed the district court's class certification order.

line of dicta in *Paige I*, the Ninth Circuit arguably left open the possibility that use of an external proxy might be justified if plaintiffs could show that an aspect of the CHP's hiring practices somehow tainted the actual pool of promotional candidates. As a result, the parties continued to spar before the district court over whether plaintiffs could use an external proxy.

In 1997, the parties again filed cross-motions for partial summary judgment on plaintiffs' disparate impact claim. Notably, even though plaintiffs continued to defend the use of an external proxy, in seeking partial summary judgment, they relied solely on *internal* data regarding the CHP's promotional examinations. Plaintiffs, through their statistical witness, presented multiple analyses purporting to show, using internal data, that CHP's promotional examinations had a disparate impact on non-white officers.

For its part, the CHP argued that plaintiffs' statistical analyses improperly (i) included examination data that were time-barred, (ii) combined data from different promotional examinations across different ranks into a single undifferentiated pool, (iii) combined examination data from different minority groups into a single "non-white" pool, and (iv) included admittedly inaccurate data. The CHP's statistical expert testified that, when these methodological errors were corrected, statistical analysis showed that the CHP promoted minority officers at rates approximating or exceeding their application rates and that, therefore, CHP's promotional processes created no disparate impact.[4]

---

4. The CHP also proffered evidence that the written portion of the promotional examinations for sergeant and lieutenant were job-related and consistent with business necessity so as to comply with Title VII even if adverse impact were shown.

The district court responded with a series of confounding rulings. Even though plaintiffs moved for summary judgment based solely on internal CHP promotional data, the district court granted plaintiffs' motion for partial summary judgment on the issue of disparate impact using (once again) an *external* statistical proxy rather than the actual pool of promotion candidates. According to the court, using the external proxy was appropriate because the CHP's *hiring* process had an inhibiting effect on minority applications for the entry level cadet position and that inhibition somehow rendered the internal pool of actual promotion candidates inappropriate.[5] App. 30a-32a, 38a-39a.

The district court also ruled on the disputes over plaintiffs' proffered statistical methodologies. As relevant here, the court ruled that plaintiffs could aggregate data across multiple promotion examinations and ranks using what is known as the "single pool" method of analysis. In particular, the district court stated without further explanation that plaintiffs' aggregation of data was "more probative" than disaggregated data. App. 40a. The court also ruled that plaintiffs could include data from the pre-limitations period in their statistical analyses and that they could aggregate all minority groups into a single "non-white" category for the purpose of comparing minority test results with those of whites. App. 40a-42a. The court again rejected all of the CHP's statistical analyses showing that, when properly analyzed, the CHP's promotional examinations produced no disparate impact.

---

5. Although plaintiffs had expressly disclaimed reliance on an external proxy in their summary judgment motion, declarations submitted by their statistical witness in support of that motion had included discussions of the cadet hiring process. The district court apparently viewed this evidence as sufficient to meet the standard suggested in *Paige I* for using an external proxy, and then readopted its reasoning in its earlier reversed ruling even though plaintiffs had not moved for judgment on that basis.

D. *Paige II*

Appealing again, the CHP once more challenged the district court's use of an external proxy to measure disparate impact as well as its apparent acceptance of plaintiffs' flawed statistical approaches to the internal promotions data.

In an opinion issued on May 31, 2002, the Ninth Circuit again agreed with the CHP on the external proxy issue. App. 8a-11a.[6] The Ninth Circuit went on, however, to endorse the district court's rulings on the validity of plaintiffs' statistical methodologies for manipulating the CHP's internal promotions data.

First, the Ninth Circuit approved as a matter of law plaintiffs' statistical method of combining the data from multiple promotional examinations for different ranks by adding together the number of minority officers that applied for all of the exams to form a single pool of applicants, and comparing that number to the total number of minority officers that were selected for promotion to all of the ranks to form a single pool of selections. App. 13a. The court also claimed (incorrectly) that other courts had approved such aggregation, citing, *inter alia*, *Hazelwood*, 433 U.S. at 308 n.8. App. 13a-14a. Second, the court also ruled that plaintiffs could show disparate impact by aggregating all minority group members into a single "non-white" pool of promotion candidates that included African Americans, Hispanics, Asians and Pacific Islanders, American Indians, and

---

6. As discussed below, the Ninth Circuit issued an amended opinion on July 18, 2002. Because much of the amended opinion was identical to the original opinion, only the amended opinion is reprinted in full in the appendix to this Petition. *See* App. 1a. The portion of the original opinion that the Ninth Circuit deleted from the amended opinion is reprinted in the appendix at App. 20a.

others, App. 14a-15a, notwithstanding uncontradicted record evidence that certain groups performed far better on the challenged examinations than other groups did.[7]

Third, the court ruled as a matter of law that plaintiffs could include in their statistical analysis of alleged disparate impact the results from promotional examinations before the start of the liability period. According to the court, inclusion of the pre-liability period data was permissible under the "continuing violation doctrine," which "allows courts to consider conduct that would ordinarily be time barred 'as long as the untimely incidents represent an ongoing unlawful employment practice.'"[8] App. 21a-22a (quoting *Morgan v. National R.R. Passenger Corp.*, 232 F.3d 1008, 1014 (9th Cir. 2000) (internal citations omitted), *aff'd in part & rev'd in part*, 122 S. Ct. 2061 (2002).

Shortly after the Ninth Circuit issued its opinion, this Court issued its decision in *National Railroad Passenger Corp. v. Morgan*, which limited application of the continuing violation doctrine to Title VII suits alleging a hostile work environment. The CHP petitioned for rehearing and rehearing en banc. It argued that the Ninth Circuit panel opinion could not stand in light of *Morgan* both because that decision made the continuing violation doctrine inapplicable to cases challenging discrete events and because, more generally, *Morgan*, *Evans*, and other cases mandated that statistical data from time-barred events – that is, events that were no longer actionable – could not be used to establish a prima facie case of disparate impact within the liability period.

---

7. For example, the evidence showed that on some examinations Asians and Pacific Islanders outperformed whites while on other examinations Hispanics outperformed whites.

8. The Ninth Circuit also declined to accept the CHP's business necessity defense as supporting summary judgment for the CHP, thereby leaving this issue open for resolution on remand.

The CHP also sought further review of the Ninth Circuit's endorsement of plaintiffs' aggregation of data across examinations, ranks, and racial groups using the "single pool" method, arguing that these holdings were both wrong and in conflict with the decisions of other circuits.

On July 18, 2002, the Ninth Circuit denied the CHP's petition for panel rehearing or rehearing en banc, but issued an amended opinion that deleted all references to the "continuing violation doctrine" and substituted a different rationale to again hold that plaintiffs could rely on time-barred data. This time, the Ninth Circuit asserted that the use of time-barred data is appropriate "if promotional practices remain similar over a long period of time, as they have in this case," citing two prior decisions, App. 15a, neither of which is on point. *See infra* at 14 n.9. The Ninth Circuit's substitute paragraph also referenced the Uniform Guidelines on Employee Selection Procedures, 28 C.F.R. § 50.14 at § 4(D) (1978). But that regulation deals with the augmentation of pools of data too small to be susceptible to meaningful statistical analysis. Here, plaintiffs have never contended that the statistical pools are too small. Aside from the substitute paragraph, the Ninth Circuit left the remainder of its opinion unchanged.

The CHP sought a stay of mandate pending the filing of a writ of certiorari with this Court. That motion was denied and trial on plaintiffs' disparate impact claim is currently set for April 8, 2003.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S APPARENTLY UNPRECEDENTED HOLDING THAT PLAINTIFFS MAY USE TIME-BARRED DATA TO PROVE DISPARATE IMPACT CREATES A BROADLY APPLICABLE RULE THAT CONFLICTS WITH THIS COURT'S DECISIONS AND THE DECISIONS OF OTHER COURTS OF APPEALS

A. Assessing Disparate Impact Using Data From Time-Barred Examinations Conflicts With This Court's Decisions Refusing To Give Legal Effect To Employment Decisions That Were Not Timely Challenged

By permitting a plaintiff to prove disparate impact by combining pre-liability period data with liability period data, the Ninth Circuit has held as a practical matter that time-barred data may serve as a "but for" cause for a finding of disparate impact liability within the liability period. Put differently, under the Ninth Circuit's approach, a plaintiff may succeed on a disparate impact claim, even when the data from within the liability period show no statistically significant disparity from a challenged employment practice, simply by adding time-barred data to the disparate impact calculus. The Ninth Circuit's holding cannot be squared with this Court's precedents, dramatically enlarges the potential liability of employers under Title VII, and conflicts with the decisions of other circuits.

The Ninth Circuit has now invoked two different theories for letting plaintiffs lump together promotional examination data from both the pre-liability and liability periods. Initially, the Ninth Circuit held that such aggregation was justified under the

"continuing violation doctrine," an exception to the usual statute of limitations rule precluding the use of time-barred data to prove liability. App. 21a-22a. When this Court's decision in *Morgan*, which sharply limited the continuing violation doctrine, vitiated that theory, the Circuit substituted its newly-minted justification: that pre-liability period data may be combined with liability period data in a disparate impact case "if promotional practices remain similar over a long period of time." App. 15a.

This change of rationale, however, does not avoid the conflict with the Court's jurisprudence. At bottom, the Ninth Circuit ruling simply converts the continuing violation doctrine from a narrow exception to the proscription against time-barred claims into a broad evidentiary rule permitting data from time-barred employment decisions to be included in statistical analyses of timely-challenged decisions. But whether one views the decision as a variation on the continuing violation doctrine or as a new evidentiary rule, the result is the same. The Ninth Circuit's ruling allows time-barred data to establish disparate impact liability even when the evidence from within the liability period, standing alone, fails to establish a disparate impact. This clearly violates the limits this Court has placed on the use of time-barred data.[9]

---

9. The Ninth Circuit's comment that the CHP's promotional practices had remained "similar" over a long period, App. 15a, is simply wrong or, at best, accurate only in the superficial sense that the format of the examinations and procedures for administering them have not changed significantly. The specific content of each examination changed each time a new examination was administered. The Ninth Circuit's efforts to bolster its ruling with case law is equally flawed. The court cited only two cases to support its authorization of the use of time-barred data, neither of which is on point. In *Bouman v. Block*, 940 F.2d 1211 (9th Cir. 1991), which the Ninth Circuit characterized as "allowing plaintiffs in a Title VII disparate impact case to aggregate results from multiple promotional exams because 'courts have repeatedly looked at

(Cont'd)

The Ninth Circuit's decision in this case is fundamentally inconsistent with the rationale underlying this Court's decisions limiting the scope of the "continuing violation" exception to the usual force of the applicable statute of limitations. *See National Railroad Passenger Corp. v. Morgan*, 122 S. Ct. 2061 (2002); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). These cases hold that employment decisions that are not challenged within the limitations period are generally not actionable. As the Court explained in *Evans*, "[a] discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. . . . [i]t is merely an unfortunate event in history which has no present legal consequences." 431 U.S. at 558. The Court made the same point in *Hazelwood School District v. United States*, 433 U.S. 299 (1977), a disparate treatment case against a public employer. The Court held that a plaintiff could not base a Title VII claim on statistical evidence relating to hiring decisions before the effective date of the

---

(Cont'd)

trends from past examinations to see if the total pass rate showed evidence of discrimination,'" App. 15a, the test results that were aggregated all related to examinations whose eligibility lists expired within the liability period, and whose applicants sought promotion to a single rank – sergeant. Similarly, in *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee*, 833 F.2d 1334 (9th Cir. 1987), the Ninth Circuit held that aggregated data covering nine years presented "a more complete and reliable picture of the effects of the JATC's admission practices." 833 F.2d at 1339. However, the data covered the years 1976 through 1984. The lawsuit had been filed in 1977. Therefore, all of the data that were aggregated fell within the limitations period, and related to a single job classification and a single unchanged employment practice.

amendments extending Title VII to public employers. As the Court explained:

> [r]acial discrimination by public employers was not made illegal under Title VII until March 24, 1972. A public employer who from that date forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes.

433 U.S. at 309 (footnote omitted). *See also International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340-41 (1977) (statistical analyses purporting to show racial imbalance misleading because they failed to identify how much of imbalance was due to pre-Act hiring decisions).

The reason for these holdings is simple: "[t]he limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past." *Ricks*, 449 U.S. at 256-57.

In *Ricks*, and again last term in *Morgan*, this Court reaffirmed this basic tenet. As the Court explained in *Morgan*, *Ricks* established that a plaintiff "could not use a termination that fell within the limitations period to pull in the time-barred discriminatory act. Nor could a time-barred act justify filing a charge concerning a termination that was not independently discriminatory." 122 S. Ct. at 2072. And in *Morgan*, the Court rejected the plaintiff's allegations based on time-barred events, emphasizing that "only incidents that took place within the timely filing period are actionable." 122 S. Ct. at 2073.

While *Morgan* continues to recognize a narrow role for the continuing violation doctrine in Title VII hostile work environment cases, it makes crystal clear that this doctrine has no application in "discrete act" cases, such as those involving "termination, *failure to promote*, denial of transfer, or refusal to hire" – in other words, the kind of case at issue here. *Id.* (emphasis added). By amending its original opinion (in the face of *Morgan*) to delete any references to the continuing violation doctrine, the Ninth Circuit tried to avoid an explicit collision with the *Evans/Ricks/Morgan* line of cases. But this effort fails. The only way the Ninth Circuit could circumvent the limitation on the continuing violation doctrine recognized in *Morgan* was to create an evidentiary rule to accomplish precisely what *Evans*, *Ricks*, and *Morgan* forbid.

The key inquiry is whether the Ninth Circuit's rule conflicts with these cases by vesting time-barred events with "present legal consequences." There can be no doubt that it does. Suppose that the data from a defendant's promotional exams within the liability period fail to show any disparate impact. Under the Ninth Circuit's evidentiary rule, a plaintiff would still be permitted to cure that failure of proof using evidence from the pre-liability period. Under these circumstances, the plaintiff's recovery would be entirely dependent on time-barred events – sins of the past that the statute of limitations, as this Court has repeatedly held, is meant to have rendered an artifact of history.[10]

10. The Court in *Evans* and *Morgan* suggested that time-barred data might serve as "background" evidence for a Title VII claim. However, that suggestion has no application in this case. As the Second Circuit (Friendly, J.) has pointed out, in a disparate treatment case, non-statistical pre-liability period evidence may be used as background evidence to show discriminatory intent during the liability period. *See Ste. Marie v. Eastern R.R. Ass'n*, 650 F.2d 395, 405-07 (2d Cir.

(Cont'd)

As far as petitioners can discern, the Ninth Circuit's authorization of using time-barred statistical data as proof of a disparate impact claim is without precedent. This holding is virtually guaranteed to generate significant confusion and controversy regarding its application in future cases. Although the amended opinion omits any reference to the continuing violation doctrine and does not discuss this Court's recent decision in *Morgan*, the circumstances and timing of its issuance will be understood to mean that, at least in the Ninth Circuit, the continuing violation doctrine remains viable as a practical matter for "discrete" employment decisions even after *Morgan*, as long as the time-barred decisions are used only as "evidence" and are not characterized as independently actionable.

Even if this result could somehow be squared with *Morgan*, *Evans*, *Ricks*, and *Hazelwood*, the practical problems it will create are enormous. Statistical analyses have come to play a common and important part of most employment discrimination litigation. The Ninth Circuit placed no limit on how far back in time a plaintiff will be permitted to go to gather data to include in statistical analyses, and under the court's treatment there is no theoretical limit. Neither the beginning of the limitations

---

(Cont'd)

1981). For example, pre-liability period racist comments by a supervisor may be introduced as evidence on the issue whether that same supervisor acted with discriminatory intent during the liability period. Thus, in *Hazelwood* (a disparate treatment case), this Court remarked that "[p]roof that an employer engaged in racial discrimination prior to the effective date of Title VII might in some circumstances support the inference that such discrimination continued. . . ." 433 U.S. at 309 n.15. But even if the concept of background evidence has any application in a disparate treatment case, it cannot possibly apply to the kind of statistical evidence covered by the Ninth Circuit's ruling. Here, the evidence is not being used as "background." Rather, it is being given equal and undifferentiated weight as the data coming from decisions made within the liability period.

period nor even the effective date of Title VII will provide a reliable benchmark for limiting discovery requests, and the potential for costly and disruptive discovery requests for data is likely to be huge. Without some limit on the use that can be made of pre-liability period data, nothing will prevent findings of liability to be based on the combination of a relatively small number of decisions during the liability period with a much larger number of decisions outside the period. Discrete and stale events that this Court declared should have "no present legal consequences" will come to dominate a significant number of employment discrimination cases, including virtually all class actions, which are already frequently unwieldy and difficult. The Court should grant review to preserve the integrity of its own decisions and prevent this disruption before it occurs.

B. The Ninth Circuit's Decision Conflicts With *Ste. Marie v. Eastern Railroad Ass'n*, 650 F.2d 395 (2d Cir. 1981) (Friendly, J.)

The Ninth Circuit's endorsement of the use of data from time-barred examinations in statistical analyses conflicts with decisions from at least one other court of appeals. In *Ste. Marie v. Eastern Railroad Ass'n*, 650 F.2d 395 (2d Cir. 1981), a plaintiff attempted to make out a prima facie case of disparate treatment on the basis of sex through statistical data showing the proportions of men and women in the defendant's workforce at two dates during the liability period. The district court had compared the percentages of each sex in the total workforce to their representation in various job categories, and concluded that women were grossly overrepresented in clerical positions and grossly underrepresented in managerial positions.

Writing for the Second Circuit, Judge Friendly rejected these statistical comparisons as "invalid on their face" because they

"fail[ed] to recognize that a large proportion of the technical and managerial positions had been filled before . . . the date when defendants' potential liability began." *Id.* at 401 (citing, *inter alia*, *Evans* and *Hazelwood*). Judge Friendly went on to discuss how inclusion of pre-liability period data had served to create a false finding of discrimination, and characterized the effect of the errors on the plaintiffs' statistical evidence as "devastating." *Id.* at 402.[11] *See also Pouncy v. Prudential Ins. Co.*, 499 F. Supp. 427, 445 (S.D. Tex. 1980) ("[T]he relevant statistics for purposes of analyzing the disparate impact claims of the plaintiff class are those statistics which reflect defendant's personnel actions taken during the relevant time period covered by this law suit, *i.e.*, for claims under 42 U.S.C. § 1981, on or after October 31, 1973, and for Title VII claims, on or after October 13, 1974.") (footnote omitted), *aff'd*, 668 F.2d 795 (5th Cir. 1982).

The Ninth Circuit's decision is also inconsistent with decisions of those courts, including the Ninth Circuit, which have analyzed promotion practices such as those at issue here involving the administration of discrete examinations that result in eligibility lists with specified expiration dates from which promotions are made during the period in which the list is used. These decisions recognize that each promotion examination represents a discrete event that has no continuing effect once the results of the examination are posted or, at the latest, once the list it generates is exhausted or expires and a new list is established. *See, e.g., Harris v. City of New York,* 186 F.3d 243,

---

11. The Second Circuit drew a sharp distinction between the use of pre-liability period *statistical* evidence, which it characterized as "invalid on its face," 650 F.2d at 401, and the use of *non-statistical* pre-liability period evidence tending to show discriminatory intent, which it considered admissible as background evidence under *Hazelwood*. *Id.* at 405-07.

248 (2d Cir. 1999); *Cox v. City of Memphis*, 230 F.3d 199, 202-05 (6th Cir. 2000); *Bouman v. Block*, 940 F.2d at 1221. But petitioners are aware of no case prior to the Ninth Circuit's ruling here that permitted the inclusion in statistical analyses of examinations that were given prior to the liability period *and* whose eligibility lists expired prior to the liability period.

In sum, the Ninth Circuit's decision creates a direct conflict with the established law of several circuits regarding the use of time-barred data in statistical analyses to evaluate claims of disparate impact. Review should be granted in order to resolve this conflict.

II. THE NINTH CIRCUIT'S HOLDING PERMITTING THE AGGREGATION OF DATA FROM DIFFERENT EXAMINATIONS AND RANKS DEFIES THE LANGUAGE OF TITLE VII AND LOGIC OF THIS COURT'S PRECEDENTS, CREATES A CIRCUIT CONFLICT, AND IS STATISTICALLY INDEFENSIBLE

In a second holding of broad application, the Ninth Circuit has established as a matter of law that a plaintiff may attempt to prove a disparate impact claim under Title VII by aggregating statistical data from different promotional examinations and different ranks into a single pool of applicants and promotees. Embedded in this holding are two profound flaws. First, by endorsing the aggregation of results from the different promotional exams used to screen for different ranks, the Ninth Circuit has defied both the plain language of Title VII and this Court's decision in *Wards Cove*, both of which demand a high level of statistical rigor when plaintiffs seek to aggregate statistics for different employment tests used to qualify for different job categories. Second, by endorsing what is known

as the "single pool" method for analyzing multiple selection events, the Ninth Circuit has authorized a discredited statistical approach specifically rejected by the Eleventh Circuit as well as various federal district courts.

In its provision dealing with disparate impact claims, Title VII emphasizes that a complaining party must identify a "particular employment practice" in stating a claim and "shall demonstrate that each particular challenged employment practice causes a disparate impact." 42 U.S.C. § 2000e-2(k)(1)(A). That statutory requirement of particularity is destroyed if, as the Ninth Circuit now permits, a plaintiff can prove a disparate impact claim with statistical analyses that mix the results of distinct promotional practices.

Here, the Ninth Circuit has developed a new and dangerous permutation of the categorization error this Court identified and corrected in *Wards Cove*. In that decision, this Court rejected the Ninth Circuit's statistical approach to a disparate impact claim involving the hiring of two different classes of workers (cannery and non-cannery) at an Alaska salmon fishing operation. At bottom, *Wards Cove* requires a separate disparate impact analysis for every different job category, "even where workers for the different positions may have somewhat fungible skills." *Wards Cove*, 490 U.S. at 653. Simply put, each part of an employer's work force must be assessed separately, because "[r]acial imbalance in one segment of an employer's work force does not, without more, establish a prima facie case of disparate impact with respect to the selection of workers for the employer's other positions." *Id.*

The Ninth Circuit's ruling mixes apples and oranges in just the fashion that the statute and *Wards Cove* prohibit. To take but one example, the Ninth Circuit has authorized plaintiffs to combine the results of the 1992 examination for prospective

sergeants with the results of the 1990 examination for prospective captains. App. 13a-14a. In this way, the Ninth Circuit has not only jumbled distinct job categories (much like the same court had done with the cannery and non-cannery workers in *Wards Cove*), it has also jumbled completely different types of examinations. For example, although the sergeants examination included a multiple choice test, the captains examination included an "in-basket" exercise.[12]

Second, in endorsing the data aggregation ruling of the district court, the Ninth Circuit has endorsed the discredited and statistically inappropriate "single pool" method of aggregating data.[13] That method works as follows. First, all the CHP officers who applied to take multiple promotional

---

12. The Ninth Circuit justifies its cross-ranks aggregation on the ground that the CHP groups its supervisory positions together when submitting its census reporting. App. 13a. The grouping of certain positions for census purposes, however, in no way suggests that such groupings are appropriate for purposes of determining liability under Title VII. Uncontradicted evidence shows that there are material differences between the duties and skills required for the various supervisory positions; that officers compete for promotion only against other officers in the same rank; and that the qualifications and experience requirements for each rank are different. In addition, the promotional examinations, which test whether candidates have the requisite knowledge required for the rank being sought, are markedly different. In these respects, the CHP is no different than other law enforcement agencies with structured hierarchies of increasing responsibility and experience.

13. Although the Ninth Circuit's opinion never refers expressly to a "single pool" methodology, its acceptance of that methodology is clear in footnote 5 of its opinion, which describes the "internal pool" as consisting of "2,842 officers who applied to be promoted." App. 7a. This number is taken directly from plaintiffs' single pool analysis, which adds together the applicants for all the examinations.

examinations (including, in this case, examinations outside the limitations period) are lumped into a single pool. Next, all the applicants actually selected for promotion from the eligibility lists created from those examinations are lumped into a single pool. Then, a comparison of the two pools is made to assess whether members of the plaintiff class within the single pool of applicants suffered a disparate impact in the selection process.

As explained succinctly in a study of statistical methods prepared for the Department of the Navy by the American Institutes for Research, the single pool method is "inherently wrong" because it treats all employees as being entirely fungible and assumes that they were all equally available for all of the aggregated selection events.

> When many selection events have occurred (e.g., a series of hiring decisions or promotion decisions), a primary concern in the statistical analysis is how to combine the data from the various selection events. A common (but incorrect) method is simply to add the numbers of protected class members and other employees who applied and who were selected across the selection events to form a single pool of applicants, divided by class membership and a single pool of selections, also divided by class membership.... *This "single pool" approach is inherently wrong, will almost always lead to incorrect calculations of the expected number of class members selected, and can result in incorrect conclusions.... The single pool approach treats all employees as being entirely fungible and assumes that they were all available during all of the selection events*. Consequently, calculations of the expected

> number of class members selected and the probability of actual number selected will be incorrect.

Kevin Gilmartin & John Claudy, PROC MULTEVENT: Multiple Events Exact Probability Test, Validation Report (1985) at 3 (emphasis in original). *See also* Ramona L. Paetzold & Steven L. Willborn, *The Statistics of Discrimination*, ¶¶4.17, 5.08 (1994); Michael O. Finklestein & Bruce Levin, *Statistics for Lawyers*, ch. 8, at 241-49 (1990).

Not surprisingly, the Ninth Circuit's endorsement of this statistically unsound method has created a conflict with other federal courts. The Eleventh Circuit has expressly rejected the statistical method embraced by the Ninth Circuit here. In *Maddox v. Claytor*, 764 F.2d 1539 (11th Cir. 1985), the Eleventh Circuit affirmed summary judgment for the defendant in a disparate impact claim in significant part because the plaintiff's statistical methods for proving disparate impact improperly muddled distinct selection events and, like the single pool method used here, suffered "from the faulty assumption that all workers at the lower levels were qualified and applied for all jobs at the higher levels." *Id.* at 1550, 1554-55.

Other lower courts have reached the same conclusion.[14] *See, e.g., Csicseri v. Bowsher*, 862 F. Supp. 547, 565 (D.D.C.

14. The Ninth Circuit cited *Hazelwood* to justify its aggregation holding. But *Hazelwood* does not discuss the propriety of including data for a number of different positions in analyzing a hiring procedure that was apparently identical for all positions and had none of the characteristics of the multiple selection events at issue here. Another case that the Ninth Circuit cited as supporting aggregation, *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee*, 833 F.2d 1334 (9th Cir. 1987), did not involve different ranks, levels of applicants, or employment practices.

1994) (explaining how single pool method of aggregation "can create the appearance of discrimination when in reality none exists"), *aff'd*, 67 F.3d 972 (D.C. Cir. 1995); *Simmons v. City of Kansas City*, No. 88-2603-O, 1992 WL 403096, at *4 (D. Kan. Dec. 7, 1992) (error to group all promotion positions rather than looking at sergeant, detective, and lieutenant separately); *Valentino v. United States Postal Serv.*, 511 F. Supp. 917, 939, 954 (D.D.C. 1981) (error to combine data for multiple positions that are not "fungible"), *aff'd*, 674 F.2d 56 (D.C. Cir. 1982); *Cooper v. Southern Co.*, 205 F.R.D. 596, 612-15 (N.D. Ga. 2001) (promotion claims analyzed properly using "multiple pools method").

Because the proper method of data aggregation is a critical issue in virtually every employment discrimination action in which statistical evidence is used and multiple selection events, such as promotional examinations, are implicated, the Ninth Circuit's decision will have enormous consequences. It raises the same problem that prompted this Court to grant review of the Ninth Circuit's decision in *Wards Cove* – namely, that the decision will allow blameless employers to be "haled into court and forced to engage in the expensive and time consuming task of defending the 'business necessity' of the methods used to select the . . . members of his work force." *Wards Cove*, 490 U.S. at 652. Indeed, as a result of the Ninth Circuit's decision in this case, the CHP faces an imminent and unwarranted trial – as inevitably will many other employers should this decision stand.[15]

---

15. To the extent that the Ninth Circuit attempts to justify the use of a single pool method on the ground that the use of aggregated data is "particularly appropriate" where small sample size may distort the data, App. 12a, it is mistaken. As petitioners' expert explained without contradiction, the sample sizes in this case are sufficient to permit valid statistical analyses.

III. THE NINTH CIRCUIT'S HOLDING PERMITTING THE INDISCRIMINATE AGGREGATION OF DATA FROM DIFFERENT MINORITY GROUPS RUNS COUNTER TO THIS COURT'S JURISPRUDENCE AND PRESENTS YET ANOTHER OBSTACLE TO THE PROPER ADJUDICATION OF TITLE VII CLAIMS

In a third holding of broad applicability, the Ninth Circuit affirmed the district court's ruling that it is "more probative" to aggregate data for distinct minority groups into a single "non-white" group for purposes of statistical analysis than to examine the impact of petitioners' promotional practices on each group separately. App. 14a-15a. According to the Ninth Circuit, plaintiffs were entitled to claim that the challenged employment practices affected all minority groups identically and further noted that the CHP had "not put forth any evidence that certain minority groups should be evaluated differently than others or that the promotional process has treated particular minority groups differently." App. 14a.

As a threshold matter, it must be noted that the Ninth Circuit's decision is patently inaccurate. The CHP presented unrebutted evidence that the minority groups at issue performed very differently on the challenged exams.[16]

But wholly apart from that case-specific complaint, the Ninth Circuit's holding, taken at face value, is unprecedented

16. Specifically, petitioners presented unrebutted evidence that Asian and Pacific Islander applicants outperformed white applicants and exceeded their expected promotions for all ranks combined. The evidence also showed that Hispanic applicants outperformed white applicants and exceeded their expected promotions on the 1992 sergeant, 1991 lieutenant, and 1990 and 1992 captains examinations.

(so far as petitioners can determine) and is in significant tension with this Court's decisions in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). In *City of Richmond*, this Court held unconstitutional a race-based set aside program on the grounds that it was not narrowly tailored due, in part, to the "random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination," including Aleuts and Eskimos, even though, as this Court observed, "[i]t may well be that Richmond has never had an Aleut or Eskimo citizen." 488 U.S. at 506. And in *Wygant*, the Court held unconstitutional a layoff plan favoring several minority groups because the plan did not identify which of those groups had suffered discrimination. 476 U.S. at 284 n.13. These decisions teach that treating all minorities as a single undifferentiated group is improper in the absence of evidence that each group separately suffered discrimination. The Ninth Circuit here violated that principle by permitting all minority officers to be aggregated into a single "non-white" group without any evidentiary basis for doing so.

More generally, the Ninth Circuit's ruling on minority group aggregation is part and parcel of its overall failure to enforce statistical rigor in disparate impact analysis. Even though disparate impact litigation calls for an exceptionally discerning approach – after all, it provides that an employer may be held liable despite an absence of any discriminatory animus – the Ninth Circuit has licensed a veritable orgy of aggregation – across ranks, across job categories, across racial boundaries, and sweeping back through time – in what will become, if this Court does not grant review, a game of statistical "gotcha" in Title VII claims within that circuit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOEL M. COHN
Counsel of Record
CHARLES L. WARREN
W. RANDOLPH TESLIK, P.C.
AKIN GUMP STRAUSS HAUER
& FELD LLP
Robert S. Strauss Building
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 887-4000

WILLIAM A. NORRIS
MICHAEL C. SMALL
AKIN GUMP STRAUSS HAUER
& FELD LLP
2029 Century Park East
Suite 2400
Los Angeles, CA 90067

BILL LOCKYER
Attorney General of the
State of California
SILVIA M. DIAZ
Supervising Deputy
Attorney General
300 South Spring Street
Suite 500
Los Angeles, CA 90013

Attorneys for Petitioners

APPENDIX

APPENDIX A — ORDER AND AMENDED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MAY 31, 2002 AND AMENDED JULY 18, 2002 AND ORDER DENYING REHEARING DATED JULY 18, 2002

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-55312

D.C. No. CV-94-00083-CBM

JEFF D. PAIGE, individually & on behalf of others similarly situated,

Plaintiff-Appellee,

v.

STATE OF CALIFORNIA; CALIFORNIA HIGHWAY PATROL; EDWARD RICHARD GOMEZ; DWIGHT HELMICK, Commissioner of California Highway Patrol,

Defendants-Appellants,

and

BUSINESS, TRANSPORTATION & HOUSING AGENCY, of the State of California; MAURICE NMI HANNIGAN, in his official capacity as Commissioner of the California Highway Patrol,

Defendants.

Appendix A

Appeal from the United States District Court
for the Central District of California
Consuelo B. Marshall, District Judge, Presiding

Argued and Submitted
January 23, 2002—San Francisco, California

Filed May 31, 2002
Amended July 18, 2002

Before: Stephen Reinhardt, Alex Kozinski and
Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Reinhardt

OPINION

REINHARDT, Circuit Judge:

This case has a long and difficult history. The allegations are serious; the plaintiffs, highway patrol officers who are members of racial minorities, allege that their employer, the California Highway Patrol ("CHP"), maintains a promotional process that discriminates against them on the basis of race. The district court and this court have struggled with the issues involved, both because of the nature and importance of the allegations, and the complex legal and factual issues involved in racial discrimination cases.

In 1994, Jeff D. Paige, a black CHP lieutenant, brought this class action pursuant to 42 U.S.C. § 1983 on behalf of all current and future non-white CHP officers. He alleged

that the promotional process of the CHP has a discriminatory impact on non-white officers in violation of Title VII of the 1964 Civil Rights Act. After a lengthy discovery period and a great number of submissions, the district court found that the CHP's promotional process resulted in a disparate impact on the plaintiff class and, accordingly, granted partial summary judgment for the plaintiffs. The CHP appealed, and we reversed and remanded for further factual findings. *See Paige v. State of California*, 102 F.3d 1035 (9th Cir. 1996); *Paige v. State of California*, No. 95-56669, 1996 WL 740839 (9th Cir. Dec. 20, 1996) (unpublished memorandum disposition) [hereinafter collectively referred to as *Paige I*]. Upon remand, the district court ordered additional discovery, and again granted partial summary judgment for the plaintiffs. The CHP again appealed, and again we consider the issues.

Background Facts

As of December 31, 1993 (the last reporting date prior to the filing of the lawsuit), the CHP employed approximately 5,675 officers, approximately 1,119, or 19.7%, of whom were officers of color. Only 102 of these non-white officers were in positions above the entry-level rank; they constituted approximately 11.1% of the total number of officers in supervisory positions. In contrast, non-white officers comprised approximately 20.9% of the CHP officers in non-supervisory positions.

In order to become a peace officer with the CHP, an applicant must first be hired as a cadet and complete a six month training program. Thereafter, the successful applicant is assigned to an entry-level peace officer position. An officer

may subsequently apply for a promotion in rank and advance to sergeant, lieutenant, captain, assistant chief, and finally, to deputy chief. No outside hiring occurs beyond the entry-level position.

In order to be eligible for promotion, an officer must pass a promotional examination.[1] There is a different examination process for each supervisory rank. For example, the exam for the sergeants rank includes an oral and written component whereas that for the position of assistant chief is oral only.[2] Although certain ranks may share the same examination format, the exam for each rank is comprised of different questions and covers different exam topics. Written exams generally consist of a multiple-choice component and an essay component. The oral exam is labeled a "qualifications appraisal interview." For the exams with a traditional written and oral component (sergeants and lieutenants), the applicants are notified by letter after the

---

1. During the period relevant to this lawsuit, the examinations were given approximately every two years. The questions differed each time the exams were administered. Although individuals who reach the higher supervisory ranks may apply for the position of Chief, there is no promotional exam for that position, and the record does not reflect whether outside candidates are eligible to apply.

2. During the relevant period of time for this lawsuit, the sergeants and lieutenants promotional exams were comprised of a written and oral component; the captains exam consisted of an "in-basket" exercise and an oral interview; and the assistant chiefs and deputy chiefs exams consisted of oral interviews only. An "in-basket" exam is a written exam in which the applicants write answers to hypothetical problems that they may confront in their future employment.

written portion that they either passed or failed. Only if they passed are they permitted to take the remainder of the exam.

When the promotional examinations are completed, an eligibility list is compiled. The eligibility list is a list of the successful applicants, ranked according to their "weighted composite score" on the completed exam. As vacancies in the supervisory ranks occur, officers are promoted in the order in which their names appear on the eligibility list. The list is used only until new exams are conducted at which time a new list is created.

Analysis

In order to make a *prima facie* case of "disparate impact" under Title VII, the plaintiffs must show "that a facially neutral employment practice has a 'significantly discriminatory' impact upon a group protected by Title VII."[3] *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 481 (9th Cir. 1983); *see also Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 645-46 (1989). This showing consists of two parts: the plaintiffs must demonstrate 1) a specific employment practice that 2) causes a significant discriminatory impact. *Wards Cove Packing Co.*, 490 U.S. at 656-67; *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988). Statistical evidence is used to demonstrate how a particular employment

3. We review the district court's conclusion as to a *prima facie* case of disparate impact *de novo* but review the underlying findings of fact for clear error. *See Tiano v. Dillard Dept. Stores, Inc.*, 139 F.3d 679, 681 (9th Cir. 1998). In particular, we give deference to a district court's findings regarding statistical evidence. *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 312 (1977).

practice causes a protected minority group to be under represented in a specific area of employment (for example, hiring or promotion). *See Watson*, 487 U.S. at 994. The statistical analysis must show a disparity that is "sufficiently substantial" as to "raise such an inference of causation."[4] *Id.* at 995.

In evaluating the impact of a particular process, we must compare the group that "enters" the process with the group that emerges from it. Here, the plaintiffs challenge several parts of the promotional process of the CHP as having a disparate impact on non-white officers. Ordinarily, we would analyze this claim by determining whether the group of officers that received promotions looks statistically different from the group that applied for such promotions — that is, we would compare the racial composition of the officers who are appointed to supervisory positions as a result of a challenged examination with the racial composition of the officers who applied for promotion to those positions. We have previously stated that "[t]he best evidence of discriminatory impact is proof that an employment practice selects members of a protected class . . . in a proportion smaller than in the actual pool of eligible employees." *Moore*, 708 F.2d at 482. However, we have also stated that this general principle is true only if there is not "a characteristic of the challenged selection device that makes use of the actual pool of applicants or eligible employees inappropriate." *Id.*

---

4. A plaintiff need not prove discrimination with "scientific certainty"; he must, however, prove any such charge by a preponderance of the evidence. *Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship and Training Comm.*, 833 F.2d 1334, 1338 (9th Cir. 1987) (quoting *Bazemore v. Friday*, 478 U.S. 385 (1986)).

Appendix A

Here, the parties do not dispute that the officers who successfully made it to the CHP supervisory ranks constitute one group for comparison. The parties do dispute, however, the group to which this first group should be compared ("the comparative group"). The defendants argue that we should conduct our statistical analysis as we ordinarily would in a promotion case and use an "internal pool" (the actual pool of promotional applicants) as the comparative group. In contrast, the plaintiffs argue that an internal pool is not appropriate because the CHP's discrimination in hiring renders that pool an inaccurate reflection of the number of qualified non-white candidates who *should* be eligible, and *would* apply, for promotions. Accordingly, the plaintiffs argue that an "external pool" should be used — that is, a pool consisting of similarly skilled peace officers in the state of California.[5]

---

5. The "external pool" is defined by the categories of the 1990 California Census that correspond to the similarly skilled positions in the CHP. According to the census, the state-wide percentage of non-white "Supervisors, Police and Detectives" (census code 414 — supervisory positions) is 23.1%. The state-wide percentage of non-white "Police and Detectives, Public Service" (census code 418 — non-supervisory positions) is 28.8%. The district court adopted the 1990 California Census codes as the appropriate measurements of qualified non-white applicants for the supervisory CHP positions.

With regard to the internal pool, of the 2,842 officers who applied to be promoted, 572, or 20.1%, were non-white. Thus, the difference between using an internal and an external pool is that in the former case, non-whites would constitute 20.1% of the total number of (actual) applicants and in the latter, 28.8% of the total number of (potential) applicants. The internal pool would, of course, vary

(Cont'd)

Appendix A

Prior to *Paige I*, the district court concluded that an external rather than internal pool was the appropriate comparative group to use in this case. On appeal, we held that the district court made insufficient factual findings to justify that conclusion. Accordingly, we remanded for further findings as to which type of pool was appropriate for use in this case and whether, using whichever pool was appropriate, a disparate impact had been demonstrated. After further discovery, the district court again found an external pool to be the appropriate comparative group, and again found a disparate impact. It found that the use of the internal pool was inappropriate because of barriers to the hiring process that resulted in an underrepresentation of non-whites in the group eligible to apply for promotions.

Much of this case's history has concentrated on the debate over the use of an external versus internal pool. We may have inadvertently contributed to this diversion from the controlling issues. In *Paige I*, in holding that the use of the external pool was unjustified on the record before us, we stated that "[t]here was no evidence offered that the CHP discriminated in hiring, or of any employment practice that deterred non-white, non-supervisory employees from applying for promotion." *Paige I*, 1996 WL 740839, at *2. The parties and the district court then devoted their efforts in large part to examining whether the CHP engaged in discriminatory hiring at the entry-level and assessing the appropriateness of

---

(Cont'd)
depending on the aspect of the promotional process challenged. For example, if the analysis focused solely on the sergeants written exam, the internal pool would consist of the officers who applied for promotion to the sergeants rank.

using an external pool. However, at the time of *Paige I*, the district court had not yet made a critical ruling that turns out to be determinative of the appropriate comparative group issue. Following our remand in *Paige I*, the district court held that, in light of the limited nature of their pleadings, the plaintiffs lacked standing to challenge the "closed promotion process" of the CHP. This ruling, which plaintiffs do not contest on appeal, leads to the inevitable conclusion that the use of an external pool in this case is inappropriate.

The district court's standing ruling was issued in response to the plaintiffs' efforts to invalidate the CHP's practice, pursuant to Cal. Veh. Code § 2251, of promoting only from within, as opposed to allowing officers from other police departments to apply for CHP supervisory positions. Obviously, as the district court noted, hiring only from within could not harm the plaintiffs, who are all members or future members of the CHP. In fact, prohibiting outside competition and thereby limiting the numbers of persons eligible to seek supervisory positions to those in the plaintiff class could only benefit the class members and improve their chances for promotion. As the district court explained, "[p]laintiffs are not subject to the limitations of § 2251 because, as members of the CHP, they are eligible to apply for supervisory vacancies." It therefore found that they lacked standing to challenge the practice. In short, the district court held that the plaintiffs may only challenge the aspects of the promotional process *that adversely affect them*, and that a closed promotional process causes them no injury.

The use of an external pool might well be appropriate in a case in which the plaintiffs are free to challenge the validity of a closed promotional process and to seek relief in the form

of an order requiring that candidates both from within and without an employer's ranks be allowed to compete for supervisory vacancies. In that circumstance, the court would have to determine whether the employer's closed promotional process served to limit disproportionately the number of non-whites who obtain supervisory positions with the employer, and accordingly, the comparative group would consist of *all* potential applicants. Where, however, as here, the plaintiffs are by class definition all members of the CHP who may only contest the aspects of the closed promotional process that adversely affect their own opportunities for promotion, the only relevant question is whether the examination process adversely affects non-white as compared to white CHP officers. In other words, does the challenged practice favor white officers over non-white officers? To answer this question, an internal pool — the pool of all officers who apply for promotion — constitutes the appropriate comparative group.[6]

In sum, we hold that an internal pool is the proper comparative group for use in determining whether the various parts of the CHP's promotional process have a disparate impact on non-white officers.[7] Although this holding requires

---

6. The plaintiffs have not offered any evidence to suggest that non-white officers who are eligible for promotion are dissuaded from actually applying for these promotions. Therefore, the pool of actual applicants is appropriate for statistical analysis as opposed to using the pool of officers who are *eligible* to apply.

7. The fact that the plaintiffs in this case are required to contest particular aspects of the promotional process comports with the general rule that, unless the factors are incapable of separation,

(Cont'd)

us to reverse the district court's grant of summary judgment for the plaintiffs, it does not require us to direct that summary judgment be awarded to the defendants. Instead, we must ask which parts of the promotional process, if any, have a disparate impact on non-white officers. This can only be answered by employing a statistical analysis based on the proper comparative group. Because the parties offer conflicting inferences drawn from the evidence they each offered as to whether the use of an internal pool shows such a discriminatory effect, there is a genuine dispute of material fact as to whether the promotional exams have a disparate impact, and this action must proceed to trial.[8]

(Cont'd)

a plaintiff must demonstrate that a particular factor or aspect of a decisionmaking process has a disparate impact. *See Watson*, 487 U.S. at 994; *Stout v. Potter*, 276 F.3d 1118, 1124 (9th Cir. 2002) (stating that plaintiffs generally cannot attack overall decisionmaking process, rather they must identify a particular element or practice); *see also* 42 U.S.C. §§ 2000e-2(k)(1)(A)(i) and (B)(i). *But see Powers v. Alabama Dept. of Educ.*, 854 F.2d 1285, 1293 (11th Cir. 1988) ("[P]laintiffs alleging class-wide discrimination in promotions are not required to isolate the particular aspect of the promotional process that is responsible for the discriminatory impact.").

8. It appears from the district court's order that the judge may have already considered some of the plaintiffs' data in which they used an internal pool for their statistical analysis. The district court stated that it granted partial summary judgment for the plaintiffs "on the issue of disparate impact resulting from the use of written examination for promotional eligibility." However, such a conclusion would not be possible using an external pool because the external pool data is not subdivided according to various types of exam-

(Cont'd)

There are, however, questions of law bound up in these factual questions. In order to give guidance to the parties and the district court, and because this case was filed eight years ago and has been before this court twice already, we address these issues now. The defendants challenge the validity of the plaintiffs' statistical analyses in three ways: First, the defendants argue that the plaintiffs improperly aggregate data from the various written examinations; second, they contend that the plaintiffs erroneously group all non-white officers together rather than analyzing the data according to each separate minority group; and third, the defendants argue that the plaintiffs may not include data from before the beginning of the liability period.

With regard to the first two arguments against the aggregation of data, it is a generally accepted principle that aggregated statistical data may be used where it is more probative than subdivided data. *See Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship and Training Comm.*, 833 F.2d 1334, 1339-40 nn.7&8 (9th Cir. 1987). Such use is particularly appropriate where small sample size may distort the statistical analysis and may render any findings not statistically probative. *See Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977); *Stout v. Potter*, 276 F.3d 1118, 1123 (9th Cir. 2002). Indeed,

---

(Cont'd)

inations. Nevertheless, the district court explicitly stated that an external pool was the appropriate measure for determining disparate impact in this case. If only because of this internal inconsistency, we cannot affirm the district court's grant of summary judgment in favor of the plaintiffs on the alternate ground that it is supported by statistical data based on the use of an internal pool.

some commentators suggest that stratification should be upheld only if the employer can demonstrate that "the stratification is appropriate, and that the stratifying variable is business justified." Ramona L. Paetzold & Steven L. Willborn, The Statistics of Discrimination § 5.08 at 35 (1996 & Supp. 2001).

The defendants first argue that the plaintiffs improperly group data from the various written exams for the supervisory ranks.[9] The district court found aggregation of the supervisory positions to be more probative than subdivided data. We agree. The plaintiffs demonstrated, by pointing to the State Personnel Reports, the Census reports, and the CHP's own descriptions of the positions, sufficient commonality among the duties and skills required by the various supervisory positions to justify aggregation. The defendants themselves group the supervisory positions together for purposes of their reports to the State Personnel Board and the EEOC. Additionally, aggregation of similar employment positions has been done in other Title VII race discrimination cases. *See Hazelwood*, 433 U.S. at 308 n.13 (aggregating various

9. The defendants also contest categorizing the "in-basket" captains exam as a written examination. However, the defendants' own witness, the Commander of the CHP's Selections and Examination Section, made clear that the in-basket exam is a written exam. He described the captains examination process as follows: "Candidates are required to respond in writing to the problems contained in the in-basket exercise. These written responses are evaluated for technical content and writing proficiency by panel members of the qualifications appraisal oral interview that follows the in-basket exercise." Thus, it is clear that the in-basket exam qualifies as a written exam.

types of public school teacher positions for purposes of analysis); *Simmons v. City of Kansas City*, No. CIV.A. 88-2603-0, 1992 WL 403096, at *6 (D. Kan. Dec. 7, 1992) (upholding statistical analysis that grouped testing procedures for all supervisory ranks of police department).

Second, the defendants contest the district court's ruling that aggregating non-white officers resulted in more probative data than would dividing them according to individual minority groups. Again, we agree with the district court. In general, "the plaintiff should not be required to disaggregate the data into subgroups which are smaller than the groups which may be presumed to have been similarly situated and affected by common policies." *Eldredge*, 833 F.2d at 1340 n.8 (quoting D. Baldus & J. Cole, Statistical Proof of Discrimination § 7.0-7.2 (1980 & 1986 Supp.)). Here, plaintiffs' theory is that the employment practices have the identical discriminatory effect upon members of all minority groups, and that those practices unlawfully benefit solely the members of the white majority. Right or wrong, they are entitled to attempt to prove their case. In addition, the defendants have not put forth any evidence that certain minority groups should be evaluated differently than others or that the promotional process has treated particular minority groups differently. *Cf. Rich v. Martin Marietta Corp.*, 522 F.2d 333, 346 (10th Cir. 1975) (holding that inclusion of "Orientals and American Indians" was not appropriate because they were not similarly situated in terms of numbers in upper echelon of the labor force). Finally, the defendants

have not presented any evidence that suggests that the stratification of data on the basis of particular minority groups is business justified.[10]

The defendants' final argument regarding plaintiffs' statistics is that the plaintiffs erroneously rely on data taken from examinations and corresponding eligibility lists that expired before the start of the liability period. However, we have held that it is appropriate to admit pre-liability period data into evidence in a disparate impact case if promotional practices remain similar over a long period of time, as they have in this case. *See, e.g., Bouman v. Block*, 940 F.2d 1211, 1226 (9th Cir. 1991) (allowing plaintiffs in a Title VII disparate impact case to aggregate results from multiple promotional exams because "courts have repeatedly looked at trends from past examinations to see if the total pass rate showed evidence of discrimination"); *Eldredge*, 833 F.2d at 1339 n.7 (finding data in a Title VII disparate impact case "more complete and reliable" when aggregated over nine years than when shown year-by-year); *see also* 28 C.F.R. § 50.14 at § 4(d) (1977) (stating that in a Title VII disparate impact case, when the data indicate that a procedure has discriminatory impact, but the data set is too small to be

---

10. As additional support for the aggregation of the statistics concerning non-white officers, we note that the class was certified as a class of "non-white" officers and the CHP did not contest this aspect of the certification. *See Paige I*, 102 F.3d at 1042 (affirming use of class-based action and stating how case would look at use of race in all applications for promotions); *see also Wards Cove*, 490 U.S. at 647 (action in which plaintiff class comprised of all non-white workers); *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1442 (9th Cir. 1984) (same).

reliable, plaintiffs may supplement data with evidence concerning the impact of the procedure over a longer period of time). We agree with the district court that pre-liability period data may properly be included in the statistical analysis in this case.

In sum, we reject the defendants' three arguments contesting certain aspects of the plaintiffs' statistical analyses. The plaintiffs may aggregate data from the various supervisory written examinations and may group all non-white officers together for comparison purposes. Additionally, "pre-liability period" data may be included in the statistical analyses. The defendants are of course equally free to introduce whatever data they may deem to be appropriate, subject to the further rulings of the district court.[11]

The defendants also argued before the district court that even if its promotional process did have a disparate impact on non-white officers, the process "fulfill[s] a genuine business need" and is therefore job related and permissible under Title VII. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971); *see also* 42 U.S.C. § 2000e-2(k)(1)(A)(i).

---

11. On summary judgment, the plaintiffs presented statistical analyses using an internal pool in support of their contentions as to the disparate impact on non-white officers of (a) the sergeants written examination standing alone; (b) the sergeants, lieutenants, and captains written examinations combined; and (c) the use of a weighted composite score for determining the eligibility lists for the sergeants rank. Upon remand, the plaintiffs are not limited to challenging these aspects of the promotional process but may offer appropriate statistical evidence regarding any of the classifications or examinations involved.

We agree with the district court that the CHP failed to show an appropriate validation of the promotional process as a whole or of its individual parts, in part because it did not present any evidence regarding how the examinations actually test for the skills identified by the CHP as critical to performing well in a particular supervisory rank. *See Griggs*, 401 U.S. at 432; *Assoc. of Mexican-American Educators v. State of California*, 231 F.3d 572, 585 (9th Cir. 2000) (en banc); *Bouman*, 940 F.2d at 1228. Therefore, on the record before us, the defendants have failed to meet their burden of production demonstrating that the promotional process is "job related."

Because we hold that an external pool is not the appropriate comparative group for determining disparate impact, the summary judgment in favor of the plaintiffs cannot stand. We also hold that the defendants have failed to demonstrate that the promotional process at issue fulfills a genuine business need; thus, they also are not entitled to summary judgment. Genuine issues of material fact remain. We therefore remand for trial at which time the parties may submit appropriate statistical and other evidence in light of our holding. We also vacate the injunction issued by the district court because it was based in part on its granting of summary judgment to the plaintiffs and its finding of disparate impact using an external pool. We express no view as to whether injunctive relief would otherwise be appropriate.

REVERSED AND REMANDED.

Appendix A

ORDER AND DENIAL OF REHEARING FILED MAY 31, 2002 AND AMENDED JULY 18, 2002

The opinion filed May 31, 2002, is amended as follows:

1. At page 7951 of the slip opinion, delete the last sentence of the first full paragraph and the two subsequent paragraphs.

2. At page 7951 of the slip opinion, add to the end of the first full paragraph (following "liability period"):

> However, we have held that it is appropriate to admit pre-liability period data into evidence in a disparate impact case if promotional practices remain similar over a long period of time, as they have in this case. *See, e.g., Bouman v. Block*, 940 F.2d 1211, 1226 (9th Cir. 1991) (allowing plaintiffs in a Title VII disparate impact case to aggregate results from multiple promotional exams because "courts have repeatedly looked at trends from past examinations to see if the total pass rate showed evidence of discrimination"); *Eldredge*, 833 F.2d at 1339 n.7 (finding data in a Title VII disparate impact case "more complete and reliable" when aggregated over nine years than when shown year-by-year); *see also* 28 C.F.R. § 50.14 at § 4(d) (1977) (stating that in a Title VII disparate impact case, when the data indicate that a procedure has discriminatory impact, but the data set is too small to be reliable, plaintiffs may supplement data with evidence concerning the impact of the procedure over a longer period of

time). We agree with the district court that pre-liability period data may properly be included in the statistical analysis in this case.

3. At page 7952, line 25 of the slip opinion, delete "under the continuing violation theory."

4. At page 7953, line 14 of the slip opinion, replace "*Bouman v. Block*, 940 F.2d 1211, 1228 (9th Cir. 1991)" with "*Bouman*, 940 F.2d at 1228."

With these amendments, the panel has voted to deny the Petition for Rehearing and Petition for Rehearing En Banc.

The Full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35.

The Petition for Rehearing and Petition for Rehearing En Banc are DENIED.

APPENDIX B — MATERIAL DELETED FROM PAGES 7951 & 7952 OF THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED MAY 31, 2002

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-55312

D.C. No. CV-94-00083-CBM

JEFF D. PAIGE, individually & on behalf of others similarly situated,

Plaintiff-Appellee,

v.

STATE OF CALIFORNIA; CALIFORNIA HIGHWAY PATROL; EDWARD RICHARD GOMEZ; DWIGHT HELMICK, Commissioner of California Highway Patrol,

Defendants-Appellants,

and

BUSINESS, TRANSPORTATION & HOUSING AGENCY, of the State of California; MAURICE NMI HANNIGAN, in his official capacity as Commissioner of the California Highway Patrol,

Defendants.

Appendix B

Appeal from the United States District Court
for the Central District of California
Consuelo B. Marshall, District Judge, Presiding

Argued and Submitted
January 23, 2002—San Francisco, California

Filed May 31, 2002

Before: Stephen Reinhardt, Alex Kozinski and
Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Reinhardt

OPINION

* * *

[7951] . . . However, we agree with the district court that pre-liability period data is proper for inclusion in the statistical analysis in this case.

Where a systemic policy of discrimination is ongoing, a plaintiff may allege a continuing violation under Title VII. *See Moore v. City of San Jose*, 615 F.2d 1265, 1274 (9th Cir. 1980). We have recognized that continuing violations are most likely to occur in cases involving placements or promotions. *See Morgan v. Nat'l R.R. Passenger Corp.*, 232 F.3d 1008, 1016 (9th Cir. 2000); *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 924 (9th Cir. 1982). The "continuing violation" doctrine "allows courts to consider conduct that would ordinarily be time barred 'as long as

the untimely incidents repre[7952]sent an ongoing unlawful employment practice.' " *Morgan*, 232 F.3d at 1014 (internal citations omitted). Thus, an ongoing and system-wide discriminatory employment practice is actionable "even if some or all of the events evidencing its inception occurred prior to the limitations period." *Williams*, 665 F.2d at 924; *see also Green v. Los Angeles County Superintendent of Schs.*, 883 F.2d 1472, 1480 (9th Cir. 1989).

In this case, the plaintiffs allege that the CHP's promotional process operates as a system-wide ongoing discriminatory policy and practice. The district court found that the "[p]laintiffs submitted evidence that the CHP's promotion policy is a continuing violation of Title VII." Therefore, the district court is correct that it is permissible for the plaintiffs to include pre-liability data in support of their allegations. Because the plaintiffs raise their claim of disparate impact under a viable "continuing violation" theory, they may use pre-liability period data to demonstrate "a systematic policy or practice of discrimination that operated, in part, within the limitations period."[11] *Morgan*, 232 F.3d at 1015.

* * * *

11. There is no debate over the fact that the CHP employed the promotional process at issue here during the liability period. Accordingly, there is no question that this action is timely. *See Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 760 (9th Cir. 1980); *see also United Air Lines, Inc. v. Evans*, 431 U.S. 553, 559-60 (1977).

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION DATED AND FILED APRIL 12, 2000

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Case No. CV 94-83 CBM (Ctx)

JEFF D. PAIGE, individually and on behalf of others similarly situated

Plaintiffs,

v.

STATE OF CALIFORNIA,
CALIFORNIA HIGHWAY PATROL, et al.

Defendants.

ORDER RE: MOTION FOR RECONSIDERATION; MOTIONS FOR PARTIAL SUMMARY JUDGMENT

I. JURISDICTION

This Court has jurisdiction over this matter pursuant to 42 U.S.C. § 2000e *et. seq.*

II. BACKGROUND

This action was filed against Defendants on January 5, 1994, alleging promotion discrimination on the basis of race in violation of Title VII of the Civil Rights Act of 1964

("Title VII") on behalf of a class, later certified by the Court, consisting of all past, present and future minority officers of the California Highway Patrol. On March 29, 1995, the Court entered summary judgment in favor of Plaintiffs on their class claim of disparate impact in promotions and entered an injunction that required future promotions to include a certain percentage of qualified minority officers. On December 20, 1996, the Ninth Circuit reversed the Court's March 29 order, vacated the injunction, and remanded the case to this Court. The Ninth Circuit found that this Court, on the record before her, improperly rejected the internal pool as a basis for determining whether Defendants' promotion practices had a disparate impact on Plaintiffs. The Ninth Circuit stated that "[t]here was no evidence offered that the CHP discriminated in hiring, or of any employment practice that deterred non-white, non-supervisory employees from applying for promotion." *Paige v. State of California, et. al.*, 105 F.3d 666, 1996 WL 740839 ** 2 (9th Cir. 1996) ("inhibiting factors"). Consequently, on April 9, 1997, at Plaintiffs' request the Court ordered discovery on the issue of hiring discrimination and set August 1, 1997 as the discovery completion date.

Plaintiffs and Defendants brought cross-motions for partial summary judgment. Defendants argued that no statistically significant adverse impact exists using an internal pool, and that Plaintiffs' statistical methodology is flawed so they cannot establish a prima facie showing of disparate impact. Defendants also argued that their written examinations are business related, and that its promotions from within policy is consistent with Title VII. On August 13, 1998, the Court granted Plaintiffs' and denied Defendants' motion for partial summary judgment on the theory of disparate

impact, finding ten inhibiting factors or characteristics of the employment practice that justify the use of an external pool rather than the internal pool.

Defendants filed a motion for reconsideration of the order granting partial summary judgment, arguing that the Order exceeded the scope of Plaintiff's motion. On March 10, 1999, the Court issued an order disagreeing with Defendants but allowing them to conduct limited discovery on the issues of recruitment and hiring and to file a supplemental opposition addressing the alleged inhibiting factors and the appropriateness of relying on an external pool. The Court deferred ruling on Defendants' motion to reconsider the August 12, 1998 Order pending a review and analysis of the supplemental filings.

III. DISCUSSION

A. Plaintiffs' Supplemental Evidence

Plaintiffs filed supplemental evidence, which includes the declarations of Richard Biddle and the declaration of Della Bahan.

B. Defendants' Supplemental Evidence

Defendants filed supplemental evidence, including the declaration of Michael Ward,[1] the declaration of Michael B. Davis, the declaration of Alan B. Deal, and supporting exhibits.

---

1. Plaintiffs do not object to the admission of Ward's Declaration. Defendant had previously identified Ward as a defense expert and Ward's Declaration is limited to a critique of the declaration of Plaintiffs' expert Biddle.

Appendix C

Plaintiffs object to the admission of the declarations of Deal and Davis. Plaintiffs argue that Defendants failed to identify Deal and Davis as experts in violation of Federal Rule 26(e) and Local Rule 6.2.2 and that during discovery Defendants failed to produce most of the documents attached to the declarations. Bahan Decl, ¶ 2.

Federal Rule 26(e) requires parties to supplement discovery responses, including expert disclosures, "if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Federal Rule 37(c)(1) provides that if a party fails to supplement its discovery responses pursuant to Rule 26(e), the party will not be permitted to utilize the documents or witnesses not properly disclosed unless the party can provide "substantial justification" or show that the failure was harmless. Local Rule 6 imposes on the parties a continuing duty to promptly advise the other of additional witnesses and additional documents, data compilations and tangible things as they become known, subject to Local Rule 6.3.2 sanctions in the case of non-disclosure:

> If a witness, document or other item has not been disclosed as required by Rules 6.2.1, 6.2.2, or 6.2.3, the witness, document, or other item may be subject to exclusion at the trial.

Plaintiffs declare that they first heard of Defendants' witness when the declarations arrived in the mail on June 30, 1999. Bahan Decl. ¶ 3. Alan B. Deal is Bureau Chief of the

Appendix C

Standards and Evaluation Services Bureau for the California Commission on Peace Officer Standards and Training. His declaration addresses the selection devices that are used in the hiring of peace officers in California. Michael B. Davis is Commander of the Selection Standards and Examinations Section of the Personnel and Training Division of the California Highway Patrol. His declaration describes the CHP's policies and practices in place from September 1989 to December 1993.

Plaintiffs declare that during discovery Defendants failed to produce some of the documents that are exhibits to the declarations. Bahan Decl. ¶ 2. In letters dated June 10, 1999 and June 23, 1999, Defendants sent to Plaintiffs five documents that had not been previously produced in response to Plaintiffs' Requests for Production Nos. 176, 188, 199, 207 and 209. Specifically, four documents were attached to Defendants' June 10, 1999 letter: (1) POST Reading and Writing Test Validation Research (1994); (2) Entry-level Reading and Writing Tests for California Law Enforcement: Final Relatedness (1976); (3) Background Investigation Project: Final Report (1977); and (4) Procedural Job-Relatedness (1976). Bahan Decl., Ex.Al. The fifth "recently discovered" document, entitled "Final Report on the Validation of Physical Maintenance Standards for State Traffic Officer (1984)," was attached to Defendant's June 22, 1999 letter. Bahan Decl, Ex. A2.

This Court will not consider the declarations of Deal and Davis and the recently produced documents because they were not previously disclosed pursuant to Federal Rule 26(e) and Local Rule 6. Plaintiffs' objections are sustained.

Appendix C

C. Defendants' Motion for Reconsideration

Having considered the arguments and evidence in support of and in opposition to the original motion and the supplemental papers filed by Plaintiffs and Defendants, this Court GRANTS Defendants' motion for reconsideration and revisits the motions for partial summary judgment on adverse impact grounds.

D. Standard for Summary Judgment

Federal Rule of Civil Procedure 56 states that summary judgment may be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In a motion for summary judgment, "[i]f the party moving for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrates the absence of any genuine issues of material fact," the burden of production then shifts so that the non-moving party must set forth, by affidavit or as otherwise provided in Rule 56, "specific facts showing that there is a genuine issue for trial." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (quoting *Celotex Corp. V. Catrett*, 477 U.S. 317, 324 (1986)).

If the factual context make the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d

1466, 1468 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

Finally, if the non-moving party bears the burden of proof with respect to an element essential to the case, and that party fails to make a sufficient showing to establish a genuine dispute of fact with respect to the existence of the element, summary judgment is appropriate. *California Architectural*, 818 F.2d at 1468 (citing *Celotex* 477 U.S. at 317).

1. Disparate Impact

Title VII provides that it is an unfair employment practice for an employer to discriminate against any individual in hiring or in the terms and conditions of employment based on the individual's race, color, religion, sex, or national origin. The limitation, classification, or segregation of employees in ways that would adversely affect them based on race, color, religion, sex, or national origin is also an unfair employment practice. *Ward Cove Packing Co., Inc. v. Atonio*, 109 S.Ct. 2115, 2118 (1989). Title VII allows the complaining party to advance a claim under a theory of disparate impact or disparate treatment. *Int'l Bd. of Teamsters v. United States*, 97 S.Ct. 1843, 1854 n. 15 (1977). Disparate impact theory provides that a facially neutral employment practice may violate Title VII without evidence of an employer's subjective intent to discriminate. *Ward Cove*, 109 S.Ct. at 2119. Plaintiffs, to establish a prima facie case under the disparate impact theory, must prove by a preponderance of the evidence that the challenged employment practice created an adverse impact on a protected class. *Connecticut v. Teal*, 457 U.S. 440, 446 (1982).

Appendix C

The starting point of a disparate impact analysis is the determination of the appropriate candidate pool and its racial composition. In promotion cases, " '[t]he best evidence of discriminatory impact is proof that an employment practice selects members of a protected class . . . in a proportion smaller than in the actual pool of eligible employees.' Disparate impact should not be measured against the actual pool of applicants, however, if 'there is a characteristic of the challenged [employment practice] that makes the use of the actual pool of applicants or eligible employees inappropriate.' In such cases, 'disparate impact may be established through reference to a reasonable proxy of the pool of individuals actually affected by the alleged discrimination.' "*Paige v. State of California, et. al.*, 105 F.3d 666, 1996 WL 740839 **2 (9th Cir. 1996) (quoting *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 482 (9th Cir. 1983)).

2. Use of the External Pool

Defendants argue in their Supplemental Opposition that "an external measure of availability . . . can never be a 'reasonable' proxy for the pool of actual minority applications." Defendants' Supplemental Opposition 9: 13-15. The Ninth Circuit has already rejected this argument in this case. *Paige*, 1996 WL 740839 **2. Defendants also argue that the "existence of inhibiting factors in the hiring process is legally and factually irrelevant to evaluation of Plaintiffs promotional claim." Defendants' Supplemental Opposition 3:11-12. The Ninth Circuit, however, aware that this is a promotions case, noted that there "may be inhibiting factors that result in the internal pool of applicants being unrepresentative" and remanded to permit this Court to determine

whether the record establishes the existence of "any employment practice that deterred non-white, non-supervisory employees from applying for promotion" or "a practice that expressly or implicitly deters non-white officers from joining the CHP or applying for supervisory positions," *Paige*, 1996 WL 740839 **2.

Defendants assert that Plaintiffs' original motion was solely based on the use of an internal measure of availability and therefore did not require a ruling on the use of an external proxy. An examination of the papers submitted in support of both parties' motions for partial summary judgment reveals that Plaintiffs indeed address characteristics of the employment practice that make the use of the actual pool inappropriate. See Plaintiffs' Memo of Points and Authorities, 4:10-7:1; Biddle Decl, ¶ 58 (Plaintiffs' expert).

Plaintiffs identified ten entrance requirements or inhibiting factors that make the actual pool unrepresentative of the local labor force: 1) applicant screening; 2) discouragement before the written test; 3) passing the written test; 4) passing the physical ability test; 5) passing the quality appraisal panel; 6) passing the psychological test; 7) passing the background investigation; 8) appointment from the eligibility list; 9) graduating from the academy; and 10) the large percentage of nonwhites in the small pool of cadets added to the large pool of state traffic officers with a small pool of nonwhites. Fifteenth Biddle Decl., ¶¶ 44, 95-99, 117, 12, 148-261, 263.

Defendants provide evidence in an attempt to challenge the entrance requirements. Regarding requirement two, discouragement before written test, Ward declares that the

conclusion is only true for African Americans, whereas Hispanics are proportionately more likely to appear for written exams than whites. Ward Decl, ¶ 9. Regarding requirement three, passing the written test, Ward declares that there are actually two tests, a multiple choice and an essay test. In particular, Ward points out that minorities passed the essay portion "at 89.9% of the white rate." Ward Decl, ¶ 10-12. Regarding requirement five, passing the quality appraisal panel, Ward declares that selection rates for minorities exceed the selection rates for whites. Ward Decl, ¶ 17. Regarding requirement nine, graduating from the academy, Ward declares that Biddle incorrectly reaches his results by improperly including pending status cadets, which reduces the standard deviation from -2.17 to -1.98. Ward Decl, ¶ 19.

The only evidence Defendants present to challenge requirements four, six, seven are the inadmissible declarations of Deal and Davis. Even if the Court were to assume that Defendants successfully challenge requirements two, three, four, five, six, seven, and nine, Defendants fail to provide any evidence that challenges inhibiting requirements one, applicant screening, and eight, appointment from the eligibility list. Plaintiffs therefore succeed in establishing the existence of requirements that make the use of the internal pool inappropriate. The Court finds that Plaintiffs' use of an external pool to illustrate statistically significant adverse impact is the appropriate measure for determining disparate impact.

The Court hereby orders that the August 13,1998 Order remain in full force and effect. IT IS SO ORDERED.

Appendix C

DATE: April 12, 2000

s/ Consuelo B. Marshall
CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED AND FILED AUGUST 12, 1999

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 94-0083 CBM

JEFF D. PAIGE, et. al.,

Plaintiffs,

v.

STATE OF CALIFORNIA, et. al.,

Defendants.

ORDER RE: (1) PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT; (2) DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT; (3) PLAINTIFF'S EVIDENTIARY MOTION; (4) DEFENDANTS' EVIDENTIARY MOTIONS

The matters before this Court, the Honorable Consuelo B. Marshall, United States District Judge, presiding, are Plaintiff Jeff D. Paige, et. al.'s ("Plaintiffs' ") Motion for Partial Summary Judgment and Defendants the State of California, et. al.'s ("Defendants' ") Motion for Partial Summary Judgment. Defendants also bring a Motion to Strike the Supplement to the Declaration of Richard Biddle as well as a Motion to Reopen Discovery on Hiring and Recruitment

Appendix D

Issues for Defendants Only. Plaintiffs file a Motion to Reopen Discovery after Remand from the Ninth Circuit. Based on the papers and argument of Counsel, this Court issues the following Order.

I. JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331.

II. BACKGROUND

Plaintiffs filed this action against Defendants on January 5, 1994, alleging promotion discrimination on the basis of race in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"). On March 29, 1995, the Court entered summary judgment in favor of Plaintiffs on their class claim of disparate impact in promotions and entered an injunction that required future promotions to include a certain percentage of qualified minority officers. On December 20, 1996, the Ninth Circuit reversed the Court's March 29 order, vacated the injunction, and remanded the case to this Court. The Ninth Circuit found that this Court, on the record before her, improperly rejected the internal pool as a basis for determining whether Defendants' promotion practices had a disparate impact on Plaintiffs.

On April 9, 1997, the Court ordered discovery reopened on the issues of hiring and recruitment and set August 1, 1997 as the discovery completion date. Plaintiffs and Defendants bring cross-motions for partial summary

judgment. Plaintiffs contend that a prima facie case of disparate impacts exists because Defendants' use of written examinations for promotion eligibility causes a statistically significant adverse impact on non-white CHP officers. Plaintiffs also contend that Defendants' promote from within policy is an unlawful business practice under Title VII. Defendants argue that no statistically significant adverse impact exists using an internal pool. Moreover, Defendants argue that Plaintiffs' statistical methodology is flawed so he cannot establish a prima facie showing of disparate impact. Furthermore, Defendants argue that their written examinations are business related, and that its promotions from within policy is consistent with Title VII.

III. DISCUSSION

Under Title VII, it is an unfair employment practice for an employer to discriminate against any individual in hiring or in the terms and conditions of employment based on the individual's race, color, religion, sex, or national origin. The limitation, classification, or segregation of employees in ways that would adversely affect them based on race, color, religion, sex, or national origin is also an unfair employment practice. *Ward Cove Packing Co., Inc. v. Atonio*, 109 S.Ct. 2115, 2118 (1989). Title VII allows the complaining party to advance a claim under a theory of disparate impact or disparate treatment. *Internat'l Bhd. of Teamsters v. United States*, 97 S.Ct. 1843, 1854 n. 15 (1977). Under the disparate impact theory, a facially neutral employment practice may be held violative of Title VII without evidence of an employer's subjective intent to discriminate. *Ward Cove*, 109

S.Ct. at 2119. To establish a prima facie case under the disparate impact theory, Plaintiffs must prove by a preponderance of the evidence that the challenged employment practice of written exams created a significant adverse impact on a protected class. *Connecticut v. Teal,* 102 S.Ct. 2525, 2530 (1982).

A. Standard for Summary Judgment Under Fed. R. Civ. P. 56.

Federal Rule of Civil Procedure 56 states that summary judgment may be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In a motion for summary judgment, "[i]f the party moving for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrates the absence of any genuine issues of material fact," the burden of production then shifts so that the non-moving party must set forth, by affidavit or as otherwise provided in Rule 56, "specific facts showing that there is a genuine issue for trial." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (quoting *Celotex Corp. V. Catrett*, 477 U.S. 317, 324 (1986)); *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103-1104 (9th Cir. 1986), *cert. denied*, 479 U.S. 949 (1986).

If the factual context make the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to

show that there is a genuine issue for trial. *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.* 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

Finally, if the non-moving party bears the burden of proof with respect to an element essential to the case, and that party fails to make a sufficient showing to establish a genuine dispute of fact with respect to the existence of the element, summary judgment is appropriate. *California Architectural*, 818 F.2d at 1468 (citing *Celotex* 477 U.S. at 317).

C. Use of An External Pool

In a disparate impact case, the proper measure of adverse impact is a comparison between the racial composition of qualified persons in the labor market and the person holding the at-issue jobs. *Ward Cove*, 109 S.Ct. at 2121. The group of "qualified persons" is the pool of actual applicants unless there is a dearth of non-white applicants due to the practices by a defendant which deter non-whites from applying for the position. *Id.* at 2122 & n. 7. Disparate impact may be established by reference to a "reasonable proxy" for the actual pool of applicants if there is a characteristic of the challenged selection device that makes the actual pool of applicants inappropriate. *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 482 (9th Cir. 1983). In *Moore*, the Ninth Circuit found that in promotion cases, the best evidence of discriminatory impact is proof that an employment practice selects members of a protected class in a proportion smaller than in the actual pool of eligible employees. *Id.* Disparate impact should not

be measured against the actual pool of applicants, however, if "there is a characteristic of the challenged employment practice that makes the use of the actual pool of applicants or eligible employees inappropriate. *Id.* In such cases, disparate impact may be established through reference to a reasonable proxy for the pool of individuals actually affected by the alleged discrimination. The Ninth Circuit found that the disparity in the pool of nonwhite supervisory applicants does not make the use of an internal pool inappropriate, without a showing that an employment practice deters nonwhites from joining or applying for supervisory positions in the CHP.

Plaintiffs have identified ten entrance requirements or inhibiting factors which make the actual pool unrepresentative of the local labor force: 1) applicant screening; 2) discouragement before the written test; 3) passing the written test; 4) passing the physical ability test; 5) passing the quality appraisal panel; 6) passing the psychological test; 7) passing the background investigation; 8) appointment from the eligibility list; 9) graduating from the academy; and 10) the large percentage of nonwhites in the small pool of cadets being added to the large pool of state traffic officers with a small pool of nonwhites. Biddle Decl. in Opp. to Def.'s Mot. For Summ. J., ¶¶ 17-18. Defendants do not provide evidence to challenge the existence of these inhibiting factors, nor do they challenge them in argument. Defendants merely continue to insist that the internal pool should be used. Since there is no evidence to the contrary, Plaintiffs have established the existence of the inhibiting factors which make the use of the internal pool inappropriate. Therefore, Plaintiffs' use of an external pool to illustrate statistically significant adverse impact is the appropriate measure for determining disparate impact.

Appendix D

D. Existence of Flaws to Plaintiffs' Adverse Impact Analyses

Defendants contend that Plaintiffs' analyses are flawed because Plaintiffs: (1) aggregated the results of multiple written and promotional examinations, as well as aggregated different minority groups; (2) relied on incorrect written test data; and (3) relied on events outside the liability period using the continuing violation doctrine, creating the false appearance of adverse impact.

1. Aggregation

Plaintiffs aggregated the results from the exams for each rank and each non-white group to illustrate the significant adverse impact on the class in an attempt to establish a prima facie case of disparate impact. Aggregated statistical data can be used when it is more probative than subdivided data. *Eldredge v. Carpenters 46 N. Cal. Counties JATC*, 833 F. 2d 1334, 1340 n. 8 (9th Cir. 1987), *cert. denied*, 487 U.S. 1210 (1988). Courts have viewed the trends in previous examinations to determine if the total pass rates illustrate evidence of discrimination. *Bouman v. Block*, 940 F. 2d 1211 (9th Cir. 1991), *cert. denied*, 502 U.S. 1005 (1991). Defendants contend that the aggregation approach is flawed, and that a more appropriate statistical methodology is the Multiple Events Exact Probability Test ("MEEPT"). Bickle Decl., ¶ 9 and Lorden Decl., ¶ 10. However, even using the MEEPT methodology, Plaintiffs still illustrate statistical significance, albeit lower than the statistical result under Plaintiffs' aggregation methodology. Biddle's Reply Decl. in Supp. of Pl. Mot. for Partial Summ. J., ¶ 16. Moreover, this Court

previously determined that aggregating the statistics for different non-white groups and different supervisory positions is more probative in this matter. Furthermore, the Ninth Circuit did not address this issue on appeal. Thus, aggregation did not flaw Plaintiffs' disparate impact analysis.

2. Reliance on Incorrect Data

Defendants contend that the data regarding multiple written tests is false. Defendants provide evidence that the State Personnel Board does not have data on the 1990 sergeant exam or on the 1991 lieutenant exam, and Plaintiffs' analysis assumed everyone who took these two exams passed. Landes Decl., ¶ 5. Further, the captain examination does not include a written test. Lopez Decl. in Opp. to Pl. Mot. for Partial Summ. J., ¶ 7. Plaintiffs provide evidence that he obtained documents with information on those who took and passed these written tests independent of the State Personnel Board. Biddle Reply Decl. in Supp. of Pl.'s Mot. for Summ. J., ¶ 23. Moreover, Plaintiffs provide evidence that statistical significance is obtained with the original data, as well as with data that did not use the 1990 and 1991 examination results in the disparate impact analysis. *Id.* at Ex. A. Furthermore, even without the results of the captains' written examination, adopting Defendants' evidence that there is no written examination in the captain's promotion process, Plaintiffs still provide evidence that statistical significance exists using only the results from the sergeants' and lieutenants' examinations. *Id.*, ¶ 52. Since these omissions do not alter the showing of statistical significance, their existence does not flaw Plaintiffs' adverse impact analysis.

Appendix D

3. Reliance on Data Outside the Liability Period

Defendants contend that Plaintiffs' adverse impact analysis relies on data from outside the liability period of this matter. Defendants rely on *Bouman v. Block*, which held that the limitation period did not begin to run until the promotion eligibility list expired. 940 F.2d 1211, 1221 (9th Cir. 1991). Defendants contend that only information relating to events after August, 1992 and before January 5, 1994 is appropriate in the adverse impact analysis because any test before August, 1992 is time barred. However, Plaintiffs are not attempting to bring a claim based on the data outside of the liability period. Plaintiffs are using pre-August, 1992 information to support his showing of statistical significance by illustrating the statistical results caused by the same practices at issue in this matter over a longer period of time. *Bouman* also holds that the statute of limitations may bar causes of action on certain evidence, "but the evidence may provide relevant background information in determining present discriminatory action." *Id* at 1218 (citing *United Air Lines v. Evans*, 97 S.Ct. 1885, 1889 (1977)). Thus, Plaintiffs' can use data outside the liability period to support his present Title VII claim, and his adverse impact analysis was not flawed by its inclusion.

Defendants provide no evidence to support their claim that Plaintiffs' adverse impact analysis was flawed. Therefore, Plaintiffs establish the existence of statistically significant disparities in the Defendants' written examinations. Thus, Plaintiffs establish a prima facie case of disparate impact.

Appendix D

C. Job Relatedness of Written Examinations

Once a prima facie case of disparate impact is shown, the burden shifts to the defendant to prove that the adverse impact is justified because the employment practice at issue is job related. *Griggs v. Duke Power Co.*, 91 S.Ct. 849, 853-54 (1971). Defendants provide evidence relating to how and why the written examinations were created. See Davis Decl. and Donnoe Decl. This evidence also described, in great length, the format of the written examinations as well as the type of knowledge for which the exams were testing each applicant. Donnoe Decl., ¶ 24. Although, Defendants' evidence goes to great length to describe the creation of the examination and the examination procedures, Defendants' evidence does not explain how the written examinations validate the skills required for the job. The evidence generally discusses the type of skills tested, but it does not explain why these skills are related to the job performance of a CHP supervisor. Nor do Defendants establish that the examinations test the candidate's ability to perform the job. Moreover, Defendants do not provide the Court with a copy of the written examinations or evidence as to how each question relates to the required skill, characteristic or ability for the position. Since Defendants do not demonstrate that the written examinations are job related, Defendants cannot show that the adverse impact of the examinations is justified.

D. Promotion From Within

Plaintiffs separately contend that California Vehicle Code § 2251, which requires the CHP to fill supervisory vacancies by promoting front the next lower rank, is an unlawful

employment practice adversely impacting non-whites. Plaintiffs further contend that an alternative practice of opening the examination process to all otherwise qualified peace officers would prevent the adverse impact on non-white peace officers. Defendants argue that § 2251 is a protected seniority system under § 703(h) of Title VII. Bona fide seniority systems are not violative of Title VII even though they may have a discriminatory impact. *American Tobacco Co. v. Patterson*, 102 S.Ct. 1534, 1541 (1982).

A seniority system is a plan that gives employees improving rights and benefits as their length of employment increases. *California Brewers Ass'n v. Bryant*, 100 S.Ct. 814, 819 (1980). A seniority system is bona fide if it does not have a discriminatory purpose. *Trans World Airlines, Inc. v. Hardison*, 97 S.Ct 2264, 2276 (1977) ("[A]bsent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences.") Plaintiffs do not contend that § 2251 has a discriminatory purpose, but do contend that § 2251 is not a seniority system. Section 2251 provides that vacancies in supervisory positions be made available only to internal applicants in the immediately lower rank. However, there is no evidence before the Court which shows that § 2251 gives CHP officers an ever increasing opportunity to advance to a higher rank as their employment tenure increases. Since § 2251 does not increase an officer's opportunity to be promoted based on the length of her employment, it is not a seniority system.

However, Defendants argue that Plaintiffs do not have standing to challenge § 2251 because the section only

adversely affects persons outside of the CHP, whereas Plaintiffs are a class of nonwhite CHP officers. To have standing, a plaintiff must demonstrates that she suffered an "injury in fact" that is fairly traceable to the defendant, and that the grievance falls within the zone of interest protected by the statutory provision at issue in the suit. *Bennett v. Spear*, 117 S.Ct. 1154, 1161 (1997). In the context of a discrimination action, standing should be denied when the plaintiff is not personally subject to the challenged discriminatory conduct. *Allen v. Wright*, 104 S.Ct. 3315, 3324, 3327 (1984). In this action, Plaintiffs are not subject to the limitations of § 2251 because, as members of the CHP, they arc eligible to apply for supervisory vacancies. Although § 2251 may operate to preclude nonwhite non-CHP peace officers from applying for supervisory positions, and may have a disparate impact on nonwhite peace officers, this limitation does not personally subject Plaintiffs to discriminatory conduct. Moreover, since Plaintiffs are not personally subject to the limitations of § 2251, no determination is reached on whether the § 2251 grievance is within the zone of interest of Title VII. Hence, Plaintiffs do not have standing to challenge the legality of § 2251.

Although Defendants did not prove that § 2251 was a seniority system under § 703(h) of Title VII, Plaintiffs do not have standing to challenge the legality of the statute. Thus, Plaintiffs cannot challenge § 2251 as an unlawful employment practice having an adverse impact on nonwhite CHP officers.

Appendix D

IV. EVIDENTIARY MOTIONS

A. Motion to Strike Supplement to Declaration In Support of Plaintiffs' Motion for Partial Summary Judgment

Defendants request that the Supplement to the Declaration of Richard Biddle in support of Plaintiffs' motion for partial summary judgment be stricken because it contains legal claims and arguments that exceed Plaintiffs' basis for partial summary judgment. Defendants also contend that Biddle was unqualified and unauthorized to present legal arguments. Plaintiffs do not dispute these arguments, but claims that Defendants' true intentions are to gain an opportunity to depose Biddle when it did not previously seek his deposition during the relevant discovery period. Although the information contained in the Supplement may be relevant and probative, its contents are outside of the scope of Plaintiffs' motion for partial summary judgment. Plaintiffs sought partial summary judgment on the adverse impact issue based on two grounds. The first attempts to establish adverse impact based on the results of the sergeants, lieutenants, and captains promotions test, and the overall results of the promotions for all ranks. The second challenges Defendants' promote from within policy. The Supplement, on the other hand, discussed the justification of the external proxy pool, the discovery of a new inhibiting factor, and alternative employment practices that Defendants could have implemented to prevent the adverse impact. Since the content of the Supplement to the Biddle Declaration exceeds the subject matter of both motions for partial summary judgment and Defendants' opposition, the declaration is stricken.

Appendix D

B. Request for Additional Discovery

Plaintiffs request that discovery be reopened to identify inhibiting factors that could have existed prior to the liability period. Discovery regarding inhibiting factors is relevant because their existence or lack thereof play a pivotal role in determining whether an internal pool is an appropriate measure for an impact analysis. As stated above, the external proxy pool is more appropriate than the internal actual applicant pool because of Plaintiffs' showing of inhibiting factors. Because this Court determines that the external proxy pool is more appropriate than the internal pool, there is no longer a need to discover evidence of inhibiting factor prior to the liability period. Therefore, Plaintiffs' request to reopen discovery is denied.

C. Motion to Reopen Discovery on Hiring and Recruitment Issues for Defendants Only

Defendants seek to reopen discovery on the hiring and recruitment issues pursuant to this Court's April 9, 1997 Order. Defendants contend that without an opportunity to pursue discovery regarding these issues, they will be unable to defend effectively against Plaintiffs' allegations concerning hiring and recruitment. Defendants also contend that they should be provided with the same discovery opportunities provided to the Plaintiffs on this matter. Defendant requests that discovery on these issues be reopened for them only for ninety days. Plaintiffs do not oppose reopening discovery on this issue for both parties, but requests that it be reopened for a period longer than 90 days.

Defendants have previously requested Magistrate Judge Turchin to compel responses to its discovery requests pursuant to the April 9 Order. Judge Turchin, after conferring with this Court, denied Defendants' motion because the April 9 Order was meant to only apply to Plaintiffs. Defendants do not request discovery relating to specific topics or individuals, they only make a general request to seek discovery regarding hiring and recruitment. Information regarding Defendants' hiring and recruitment practice should be within Defendants' control, and Defendants do not contend that this information is beyond their control. Hence, Defendants' request to reopen discovery is denied.

V. CONCLUSION

For the foregoing reasons, this Court GRANTS in part Plaintiffs' Motion for Partial Summary Judgment and DENIES in part Defendants' Motion for Partial Summary Judgment on the issue of disparate impact resulting from the use of written examination for promotional eligibility. This Court also GRANTS in part Defendants' Motion for Partial Summary Judgment and DENIES in part Plaintiffs' Motion for Partial Summary Judgment on the issue of the California Vehicle Code § 2251 being an unlawful employment practice. This Court GRANTS Defendants' Motion to Strike the Supplement to the Biddle Declaration; DENIES Plaintiffs' Motion to Extend Discovery; and DENIES Defendants' Motion to Reopen Discovery.

IT IS SO ORDERED.

s/ Consuelo B. Marshall
CONSUELO B. MARSHALL
DATED: August 12, 1998 United States District Judge

Supreme Court, U.S.
FILED
JAN 17 2003
OFFICE OF THE CLERK

No. 02-765

IN THE

Supreme Court of the United States

STATE OF CALIFORNIA, CALIFORNIA HIGHWAY PATROL, DWIGHT HELMICK, and EDWARD GOMEZ,
Petitioners,

v.

JEFF D. PAIGE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION

DELLA BAHAN
BAHAN & ASSOCIATES
128 North Fair Oaks Avenue
Pasadena, California 91103

WALTER KAMIAT
Of Counsel
3003 Van Ness Street, N.W.
Washington, D.C. 20008

DENNIS M. HARLEY
Counsel of Record
510 South Marengo Avenue
Pasadena, California 91101
(626) 796-7555

Attorneys for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
COUNTERSTATEMENT OF THE CASE	1
ARGUMENT	3
I. THE DECISION BELOW IS ENTIRELY CONSISTENT WITH ESTABLISHED LAW RELATING TO TITLE VII'S LIMITATIONS POLICIES, INCLUDING THIS COURT'S DECISIONS IN *NATIONAL RAILROAD PASSENGER CORP. V. MORGAN, DELAWARE STATE COLLEGE V. RICKS,* AND *UNITED AIR LINES, INC. V. EVANS*	3
II. THE DECISION BELOW COMPORTS WITH UNIFORM DECISIONAL LAW ON THE USE OF "AGGREGATED" STATISTICS IN TITLE VII CASES	12
CONCLUSION	15

TABLE OF AUTHORITIES

FEDERAL CASES — Page

Alexander v. Gardner—Denver Co., 415 U.S. 36 (1974) 7
Bazemore v. Friday, 478 U.S. 385 (1986) 10
Bouman v. Block, 940 F.2d 1211 (9th Cir. 1991) *cert. denied*, 502 U.S. 1005 (1991) 4
Capaci v. Katz & Besthoff, 711 F.2d 647 (5th Cir. 1983), *cert. denied*, 466 U.S. 927 (1984) ... 5, 13
Cooper v. Southern Co., 205 F.R.D. 596 (N.D. Ga. 2001) 14
Csicseri v. Bowsher, 862 F. Supp. 547 (D.D.C. 1994), aff'd, 67 F.3d 972 (D.C.Cir. 1995) 5
Delaware State College v. Ricks, 449 U.S. 250 (1980) 3, 6, 7
Denny v. Westfield State College, 669 F. Supp. 1146 (D. Mass. 1987), *aff'd*, 880 F.2d 1465 (1st Cir. 1989) 5, 13
Eldredge v. Carpenters, 833 F.2d 1334 (9th Cir.1987) 4
Ezell v. Mobile Housing Bd., 709 F.2d 1376 (11th Cir.1983) 13
Freeman v. Package Machinery Co., 865 F.2d 1331 (1st Cir. 1988) 6
Gomes v. Avco Corp., 816 F.Supp. 131 (D. Conn. 1993) 13
Grant v. Bethlehem Steel, 635 F.2d 1007 (2d Cir. 1980) 5
Griggs v. Duke Power Co., 401 U.S. 424 (1971) .. 5
Hazelwood School District v. United States, 433 U.S. 299 (1977) 6, 10, 12
International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) 6, 11, 12
Maddox v. Claytor, 764 F.2d 1539 (11th Cir. 1985) 13

TABLE OF AUTHORITIES—Continued

Page

Mohasco Corp. v. Silver, 477 U.S. 807 (1980)..... 11
National R. R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002)..... *passim*
Paxton v. Union Nat'l Bank, 688 F.2d 552 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983)..... 13
Payne v. Travenol Laboratories, Inc., 673 F.2d 798 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982)..... 5
Ste. Marie v. Eastern R. R. Ass'n, 650 F.2d 395 (2d Cir. 1981)..... 6
Simmons v. City of Kansas City, 1992 U.S. Dist. LEXIS 20231 (D. Kan. 1992)..... 14
Ste. Marie v, Eastern Railroad Ass'n, 650 F.2d 395 (2d Cir. 1981)..... 6
United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977)..... *passim*
United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 929, 952 (10th Cir. 1979)..... 5
Valentino v. United States Postal Service, 674 F.2d 56 (D.C.Cir. 1981)..... 13
Vulcan Pioneers, Inc. v. New Jersey Department of Civil Service, 625 F. Supp. 527 (D.N.J. 1985), *aff'd*, 832 F.2d 811 (3d Cir. 1987)..... 13
Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)..... 14

FEDERAL STATUTES

42 U.S.C. §2000e-2(a)..... 7
42 U.S.C. §2000e-5(e)(1)..... 6

TABLE OF AUTHORITIES—Continued

FEDERAL REGULATIONS Page

29 C.F.R. § 50.14(d)(1977) 4
29 C.F.R. § 1607.4(D)(2002) 5

OTHER AUTHORITIES

Ramona L. Paetzold & Steven L. Willborn, *The Statistics of Discrimination* (1996 & Supp. 1)... 13
David C. Baldus & James W.L. Cole, Ph.D., *Statistical Proof of Discrimination* (1980) 13
B. Lindemann & P. Grossman, *Employment Discrimination Law* (3d ed. 1996) 13

IN THE

Supreme Court of the United States

No. 02-765

STATE OF CALIFORNIA, CALIFORNIA HIGHWAY PATROL, DWIGHT HELMICK, AND EDWARD GOMEZ,
Petitioners,

v.

JEFF D. PAIGE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

This is a class action race discrimination case brought pursuant to Title VII of the Civil Rights Act of 1964, as amended. Respondents are a class of all nonwhite California Highway Patrol officers who have been, are, or will be discriminated against on the basis of their race regarding the terms and conditions of their employment, including the denial of job assignments, transfers and promotions. The case has focused on promotional decisions taken by the California Highway Patrol during the relevant limitations period, based on selection devices which allegedly have a disparate impact on minorities.

Petitioners seek review of a Ninth Circuit decision in which a unanimous panel (Reinhardt, Kozinski &

Hawkins, JJ.) reversed the District Court's grant of summary judgment for Respondents on the issue of disparate impact, and rejected Petitioners' arguments that summary judgment on that issue should be awarded to them instead. In the words of the panel, "[b]ecause the parties offer conflicting inferences drawn from the evidence they each offered as to whether the use of [statistical data taken from] an internal pool [of available applicants] shows such a discriminatory effect, there is a genuine issue of material fact as to whether the promotional exams have a disparate impact, and this action must proceed to trial." Pet. App. 11a.

In the course of finding "genuine dispute[s] of material fact as to whether the promotional exams have a disparate impact," the unanimous panel discussed three "questions of law" raised by Petitioners that were "bound up in these factual questions." Pet. App. 11a-12a. In each instance, Petitioners argued that Respondents' proffered statistical evidence was insufficiently specific, *i.e.*, that it analyzed insufficiently narrow subsets of data concerning the challenged practices. The panel rejected Petitioners' contention that their legal theories would bar any relief regardless of the state of the factual (including statistical) evidence, recognizing instead that Respondents' proffered evidence raised sufficient questions for trial, and that, at trial, Petitioners' arguments would properly go to the relative weight of the parties' competing statistical theories. While ruling that Respondents' statistical evidence is not legally barred, the panel emphasized that "defendants are of course equally free to introduce whatever data they may deem appropriate" and to argue that favorable inferences be drawn from that data. Pet. App. 16a.

Despite the fact that Petitioners cite absolutely no prior decision of any court that adopts their legal theories, and despite the fact that they will have a full opportunity at trial to offer competing statistical evidence and to argue for

its greater probative force, Petitioners nonetheless mischaracterize the unanimous panel decision below as creating clear conflicts with the law of this Court and of other circuits, and as dangerously "licens[ing] a veritable orgy of aggregation . . . in what will become, if this Court does not grant review, a game of statistical 'gotcha' in Title VII claims . . . ." Pet. 28.

Nothing could be further from the truth.

The decision below is simply unexceptional. The Ninth Circuit's views on the permissible scope of statistical evidence in disparate impact cases are in complete harmony with the decisions of this Court and other federal courts, and with the regulations of the Equal Employment Opportunity Commission ("EEOC"). The decision below states no novel legal holdings. Certainly, it states no holdings that are either the subject of such ongoing deliberation in the federal courts of appeals, or otherwise of such novelty or import as to merit this Court's granting of certiorari review. The petition should be denied.

ARGUMENT

I. THE DECISION BELOW IS ENTIRELY CONSISTENT WITH ESTABLISHED LAW RELATING TO TITLE VII'S LIMITATIONS POLICIES, INCLUDING THIS COURT'S DECISIONS IN *NATIONAL RAILROAD PASSENGER CORP. V. MORGAN, DELAWARE STATE COLLEGE V. RICKS, AND UNITED AIR LINES, INC. V. EVANS.*

A. At the outset, it is worth noting the precise nature of the issue Petitioners raise regarding Title VII's limitations policies and the Ninth Circuit's disposition of that issue. Petitioners do not assert—and could not assert—that Respondents seek relief from time-barred employment decisions: all agree that Respondents seek relief only from decisions that occurred during the relevant limitations period and that their suit was timely filed. Rather, Petitioners assert

that Title VII's limitations policies go well beyond barring recovery for decisions taken outside the relevant limitations period and also bar recovery for decisions taken within that period, if proof of their discriminatory nature relies in part on evidence of statistical trends which commenced before the limitations period began. Petitioners fail to cite a single case that has held this to be the law.

Rather, the unanimous Ninth Circuit panel held only that evidence of statistical trends from outside the limitations period may be used when relevant to understanding employment practices that, because they occurred within the limitations period, are properly subject to challenge:

> [I]t is appropriate to admit pre-liability period data into evidence in a disparate impact case if promotional practices remain similar over a long period of time, as they have in this case. *See, e.g., Bouman v. Block*, 940 F.2d 1211, 1226 (9th Cir. 1991)[*cert. denied*, 502 U.S. 1005 (1991)] (allowing plaintiffs in a Title VII disparate impact case to aggregate results from multiple promotional exams because "courts have repeatedly looked at trends from past examinations to see if the total pass rate showed evidence of discrimination"); *Eldredge* [*v. Carpenters*], 833 F.2d [1334,] at 1339 n.7 [(9th Cir. 1987) (finding data in a Title VII disparate impact case "more complete and reliable" when aggregated over nine years than when shown year-by-year); *see also* [EEOC Uniform Guidelines on Employee Selection Standards ("Uniform Guidelines")] 29 C.F.R. § 50.14 at 4(d) (1977) (stating that in a Title VII disparate impact case, when the data indicate that a procedure has discriminatory impact, but the data set is too small to be reliable, plaintiffs may supplement data with evidence concerning the impact of the procedure over a longer period of time).

Pet. App. at 15a-16a.

As the Court of Appeals recognized, its holding was consistent with the EEOC's Uniform Guidelines[1] which are entitled to deference as the administrative interpretation of Title VII by the enforcing agency. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971). Pet. App. 16a.

More importantly, the decision below is fully consistent with the positions of numerous other courts of appeals, which have frequently considered pre-limitations period selection data when that evidence is relevant to determining whether the same or similar practices within the limitations period have a disparate impact.[2] Thus, this case presents no conflict

---

[1] Petitioners do not dispute that this is the EEOC rule, but contend instead that the EEOC only approves the use of older data where the statistical sample size would be too small if confined to the limitations period. In fact, the EEOC has never embraced the notion that the limitations period is a relevant restriction in this regard, and the EEOC rule makes no reference to the limitation period. 29 C.F.R. § 1607.4(D) (2002). Moreover, Respondents have submitted evidence, including expert opinion, that, as to certain of their statistical analyses, the sample size would be too small if limited to data within the limitations period. Excerpt of Record ("ER"), Vol. VII, 39 at 11-12. Petitioners ignore this. Of course, if this is the real matter in dispute in this case, it raises only a narrow factual question that hardly calls for this Court to grant a writ of certiorari.

[2] In each of the following cases, the court considered statistical evidence well beyond Title VII's limitations period to support a finding that the employment practice in question was discriminatory in nature. *See, Capaci v. Katz & Besthoff*, 711 F.2d 647, 655-56 (5th Cir. 1983), *cert. denied*, 466 U.S. 927 (1984) (data from 1965 to 1977); *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 820-21 & nn. 32-34 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982) (data from 1969 to 1974, which entirely predated the limitations period); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 929, 952 (10th Cir. 1979) (data from 1968 to 1974); *Grant v. Bethlehem Steel*, 635 F.2d 1007, 1017-18 (2d Cir. 1980) (data from 1970 to 1975); *Csicseri v. Bowsher*, 862 F. Supp. 547, 560-61 (D.D.C. 1994), *aff'd* 67 F.3d 972 (D.C.Cir. 1995) (data from 1984 to 1990); *Denny v. Westfield State College*, 669 F. Supp. 1146 , 1148 (D. Mass. 1987) (data from 1974 to 1984), *aff'd other grounds*, 880 F.2d 1465

between or among the circuits that would call for this Court's grant of a writ of certiorari.[3]

B. Nonetheless, Petitioners argue that the decision below is "fundamentally inconsistent with the rationale underlying this Court's decisions" on the limitations policies of Title VII, citing *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), *Delaware State College v. Ricks*, 449 U.S. 250 (1980), and *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). Pet. at 15. In fact, it is Petitioners who propose an approach to Title VII limitations policy that is "fundamentally inconsistent" with these decisions.

1. All three of the cited cases involve the administration of Title VII's limitations period, which is stated at 42 U.S.C. §2000e-5(e)(1).[4] *Morgan* explained that this section "is a

---

(1st Cir. 1989); *Freeman v. Package Machinery Co.*, 865 F.2d 1331, 1334, 1338-39 (1st Cir. 1988) (data showing pattern over two decades).

[3] The only court of appeals decision that Petitioners even argue is in conflict with the decision below is *Ste. Marie v. Eastern Railroad Ass'n*, 650 F.2d 395 (2d Cir. 1981), a disparate treatment case which noted (as did this Court in *Hazelwood School District v. United States*, 433 U.S. 299, 309-10 (1977)) that a static comparison of workforce representation rates can misleadingly suggest ongoing discrimination where the present racial imbalance results from time-barred employment decisions that are of no demonstrated relevance regarding current employment practices. *Compare International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977) ("Evidence of long-lasting and gross disparity between the composition of a workforce and that of the general population thus may be significant . . . ."). The court in *Ste. Marie* did not exclude such evidence, but found plaintiffs' statistics flawed because they included data regarding the failure to promote clearly unqualified individuals. *Id.* at 401. Here, Respondents' statistical analyses do not rely on static workforce comparisons but instead compare the rates at which whites and minorities are promoted as evidence that the selection devices used during the limitations period have a disparate impact on otherwise qualified minorities.

[4] Section 2000e-5(e)(1) provides that "(1) A charge under this section shall be filed within one hundred and eighty days after the alleged

charge filing provision that 'specifies with precision' the prerequisites that a plaintiff must satisfy before filing suit." 536 U.S. at 119 (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974)). The section "requires that a Title VII plaintiff file a charge with the Equal Employment Opportunity Commission (EEOC) either 180 or 300 days 'after the alleged unlawful employment practice occurred.'" *Id.* at 116 (quoting §2000e-5(e)(1)). The section's purpose is "to encourage the prompt processing of all charges of employment discrimination" by employees seeking a remedy for an alleged unlawful employment practice. *Id.* at 119 (citation and internal quotation marks omitted). "The critical questions [in applying this provision], then are: What constitutes an 'unlawful employment practice' and when has that practice 'occurred'?" *Id.* at 120. And *Morgan* makes clear that the term "unlawful employment practice" refers to such discrete adverse acts against a plaintiff as a discharge, a refusal to hire or promote, or a payment of discriminatory compensation. *Id.* at 120-21 (discussing 42 U.S.C. §2000e-2(a)).

Morgan, Ricks and *Evans* all understand Title VII's limitations provision in this manner. In other words, they interpret the provision to bar relief from a discrete adverse "unlawful employment practice" that occurred outside the limitations period. None of these cases apply the provision to exclude evidence of selections made prior to the limitations

---

unlawful employment practice occurred . . ., except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier . . . ."

period that might be highly relevant to determining whether employment practices within the limitations period were discriminatory in nature. Yet that is precisely the use to which Petitioners seek to put this body of law. Petitioners can cite no case that has done so.

2. *Morgan* discusses prior Supreme Court precedents in terms that are wholly consistent with the decision below, and emphasizes that arguably discriminatory employment practices prior to the beginning of the limitations period "'may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue'" so long as the emphasis is on "'whether any present violation exist[s].'" *Id.* at 121 (quoting *Evans*, 431 U.S. at 558). Thus, when relief is sought only for a discrete "employment practice" that "occurred" within the limitations period, the action is timely, even when the challenged act has a connection to other, pre-liability period acts. "Each discrete discriminatory act starts a new clock for filing charges alleging that act." *Id.* at 122.

3. Indeed, *Morgan* demonstrates that the holding below creates no tension with this Court's precedents.

Morgan involved the application of Title VII limitations principles to discrimination claims alleging a hostile environment, a Title VII theory under which the context created by a pattern of related prior workplace acts can be found discriminatory, even if the most recent act, standing alone, might not be of sufficient gravity to be independently actionable. *Id.* at 122-23.

The controversy in *Morgan* concerned whether a plaintiff seeking relief under this theory could obtain recovery for otherwise time-barred acts that, together with the more recent acts, constituted the ongoing hostile environment. The Court majority held that as long as "any act that is part of the hostile work environment" occurred during the limitations period,

plaintiff could recover for all related acts, as "the entire hostile work environment encompasses a single unlawful employment practice." *Id.* at 125. In contrast, the dissent argued that recovery should be limited to those acts that occurred within the limitations period, even if their unlawful nature depended on a showing that they were part of a longer-term discriminatory pattern.[5]

Neither of the opinions in *Morgan* argued that Title VII limitations policies bar the evidentiary use of acts outside the limitations period to show the discriminatory nature of acts within that period. Indeed, such a position—which is the essence of Petitioners' position here—is inconsistent with the approaches of both the *Morgan* majority and the *Morgan* dissent.

Respondents here seek relief solely for employer acts taken *within* the limitations period, a far more modest position than that of the plaintiffs in *Morgan*. As the Court of Appeals recognized—when it unanimously rejected Petitioners' petition for rehearing, which largely relied on *Morgan*—nothing in *Morgan* is in tension with the decision below.

4. Petitioners' confusion about Title VII's limitations policies can best be illustrated by reference to their reliance on language from *Evans*: "'[a] discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed . . . . [i]t is merely an unfortunate event in history which has no present legal consequence.'" Pet. 15 (quoting

---

[5] "Although a hostile environment claim is, by its nature, a general atmosphere of discrimination not completely reducible to particular discriminatory acts, each day the worker is exposed to the hostile environment may still be treated as a separate 'occurrence,' and claims based on those occurrences forfeited. In other words, a hostile environment is a form of discrimination that occurs every day; some of those daily occurrences may be time barred, while others are not." *Id.* at 129 (O'Connor, J., dissenting).

Evans, 431 U.S. at 553; omissions as in Petition). On this basis, Petitioners argue that selections made prior to the limitations period cannot, as a matter of law, be included in the data used to evaluate the present legal consequence of a current employment practice.

But this Court has never understood *Evans* as protecting employers if they allow pre-Act or pre-limitations period discrimination to infect more recent employment decisions. Certainly the Court has never prohibited the use of pre-Act or pre-limitations period data to evaluate the nature of employment practices that occur within the limitations period which are then made the subject of a timely charge by an adversely affected employee. Quite the contrary.

The Court has made this point explicit in precisely the context of Petitioners' analogy, the use of evidence of pre-Act discrimination to challenge similar current practices. In *Bazemore v. Friday*, 478 U.S. 385 (1986), the Court rejected a court of appeals holding that, under the rationale of *Evans*, an employer's current pay practices could not be challenged by showing that they were discriminatorily adopted prior to the effective date of the statute. In the Court's words, "[w]hile recovery may not be permitted for pre-1972 acts of discrimination, to the extent that this discrimination was perpetuated after 1972, liability may be imposed. Each week's paycheck . . . is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Id.* at 395. Moreover, "to establish discrimination with respect to salary disparities created after 1972, . . . evidence of pre-Act discrimination is quite probative." *Id.* at 402, n.13. This is "'particularly [so] where relevant aspects of the decisionmaking process had undergone little change.'" *Id.* at 402 (quoting *Hazelwood*, 433 U.S. at 309-10, n.15). The reasoning of the Ninth Circuit's decision here is no different. *See* Pet. App. 15a ("[I]t is appropriate to admit pre-liability period data into

evidence in a disparate impact case if promotional practices remain similar over a long period of time, as they have in this case.").

The overall pattern of Supreme Court treatment of Title VII limitations policy runs entirely against the extreme implications of Petitioners' position that the statute of limitations should bar statistical evidence of prior employment patterns. The limitations periods applicable to Title VII claims are recognized as "'obviously quite short deadlines.'" *Morgan*, 536 U.S. at 16 (quoting *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980)). This corresponds to their purpose of encouraging the prompt filing of discrimination claims. *Morgan*, 536 U.S. at 16. If their purpose were expanded to bar the use of statistical evidence from outside the limitations period, individuals who promptly filed their claims would nonetheless often be unable to prove the discriminatory nature of the actions taken against them because the number of decisions made during the liability period would be too small. *See, e.g., Teamsters*, 431 U.S. 324, 339 n.20 (small sample size may detract from evidentiary value of statistical evidence).[6] Statistical challenges to

---

[6] An employment practice may not generate enough selection data within a 180 or 300 day period to permit valid statistical conclusions to be drawn about its impact on a protected group. Especially where, as here, an employer uses the results of a discriminatory test over a period of time, the illogic of Petitioners' proposed data-limitations rule is clear. As Petitioners admit, "During the time period relevant to this case, the CHP gave the promotional examinations for each rank at roughly two-year intervals . . . Each eligibility list remained effective until the next promotional examination was administered and a new, superseding list generated." Pet. 6. Under Petitioner's theory, a party could not use selection data from the entire life of a promotional list, either to prove or to disprove disparate impact. This artificial restriction on the data for statistical analysis might, for example, exclude white candidates who were disproportionately clustered at the top of the list and promoted before the limitations period began, or otherwise mask disparate impact which could be shown by analyzing the results of the entire promotional cycle.

discriminatory employment systems would become far more difficult to prove, and unlawful employment practices of the past would far more easily be perpetuated into the future. Nothing in the statute or its interpretation by this or any other court supports such results.

II. THE DECISION BELOW COMPORTS WITH UNIFORM DECISIONAL LAW ON THE USE OF "AGGREGATED" STATISTICS IN TITLE VII CASES.

A. Petitioners also challenge the Ninth Circuit's holding that, at trial, Respondents may introduce statistical analyses which use data from different promotional test administrations and data reflecting selection rates of the entire plaintiff class, while Petitioners will be "equally free to introduce whatever data they may deem to be appropriate, subject to the further rulings of the district court." Pet. App. 16a.[7] There is nothing unusual about this approach. As this Court explained in *Hazelwood*,

> [S]tatistics . . . come in infinite variety . . . .Their usefulness depends on all of the surrounding facts and circumstances.' Only the trial court is in a position to make the appropriate determination after further findings.

433 U.S. at 312 (quoting *Teamsters*, 431 U.S. 324, 340). *See Hazelwood*, 433 U.S. at 308 n.13 (aggregating various types of public school teacher positions for purposes of analysis).

The use of aggregated data of different sorts in Title VII cases has been allowed throughout the circuits. *See, e.g.*,

---

[7] As is frequently true, Respondents' analyses using aggregated data are among alternative analyses offered as evidence. Respondents also demonstrated the disparate impact of certain selection devices by analyzing discrete supervisory ranks, specific test administrations, and different minority groups separately. ER Vol. IV, 32 at 9; VII 39 at 5, 8, 10-11, 15. *See also* ER Vol. VII, 39 at 7-8.

Ezell v. Mobile Housing Bd., 709 F.2d 1376, 1382 (11th Cir.1983) (data from 29 different tests); *Capaci*, 711 F.2d at 655 (twelve years of data from different geographic locations); *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 564-65 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983) (data concerning different positions); *Gomes v. Avco Corp.*, 816 F.Supp. 131, 136 (D. Conn. 1993) (data from four companies); *Denny*, 669 F. Supp. at 1149-50 (data from different university departments); *Vulcan Pioneers, Inc. v. New Jersey Department of Civil Service*, 625 F. Supp. 527 (D.N.J. 1985), *aff'd other grounds*, 832 F.2d 811 (3d Cir. 1987) (different tests in different municipalities; analysis of total minority pass rates).[8]

Indeed, each of the cases cited by Petitioners also allowed studies based on aggregated data to be used as evidence, although at times such evidence was ultimately found persuasive and at times it was ultimately found unpersuasive. *See Maddox v. Claytor*, 764 F.2d 1539, 1555 (11th Cir. 1985) (treating the aggregated nature of data as going to its probative value and stating that "[t]he weight of all the relevant evidence is for the district court in the first instance"); *Valentino v. United States Postal Service*, 674 F.2d 56, 65 & n.10 (D.C. Cir. 1981) (admission of pre-liability period

---

[8] The Ninth Circuit's decision is also consistent with leading treatises. *See* Ramona L. Paetzold & Steven L. Willborn, *The Statistics of Discrimination* §§ 4.17, 5.08 & n.4 (1996 & Supp. 1) (data may need to be combined or pooled across strata in order to yield a summary inference; suggesting that stratification should be upheld only if the employer can demonstrate that "the stratification is appropriate, and that the stratifying variable is business justified"); David C. Baldus & James W.L. Cole, Ph.D., *Statistical Proof of Discrimination*, § 4.12 (1980) (discussing appropriateness of analyzing the effect of an entire system rather than its component parts); 1. B. Lindemann & P. Grossman, *Employment Discrimination Law* 105 (3d ed. 1996) (aggregation of different years, tests, job categories and departments has been permitted in disparate impact cases where sample size is small).

evidence relating to promotional system was appropriate; plaintiffs' analysis was admitted but found not persuasive because it failed to control for education and job classification; analysis "might have been impressive" where comparison groups held similar jobs); *Cooper v. Southern Co.*, 205 F.R.D. 596, 612, 614 (N.D. Ga. 2001) (expert used pooled data concerning employees who were promoted by multiple means; court rejected argument that it is improper to combine data from both progressive and competitive promotions for analysis "because both types of promotions involve evaluative choices by management"); *Csicseri*, 862 F.Supp. at 564 (stating that "both experts engaged in mathematical acrobatics and statistical juggling" but defendants' expert was "more credible"); *Simmons v. City of Kansas City*, 1992 U.S. Dist LEXIS 20231, at *11-12, *14-15 (D. Kan. 1992) (plaintiffs' statistical analysis was admitted into evidence but found to be "unpersuasive"; court cited with approval defense analysis which grouped promotions for each testing period).

Here, Respondents' statistical analyses using aggregated data are supported, *inter alia*, by: (1) evidence that the scrutinized selection devices are similar and their aggregation is therefore justified, (2) a class definition which includes all minorities, justifying analysis of minorities as a group,[9] and (3) other statistical analyses, using less aggregated data

---

[9] Petitioners' reliance on *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) is misplaced. Indeed, *Wards Cove* did not criticize the use of data which, as here, grouped the entire plaintiff class of nonwhites. Rather the case was concerned that a plaintiff specify the particular "employment practice" he or she seeks to challenge. Here, Respondents have identified the sergeants, lieutenants, and captains promotional selection processes, and specific components of those processes, as having a disparate impact on minorities as a class, and on specific minority groups in isolation. Whether a plaintiff's statistical analyses used to prove the discriminatory nature of *specified* employment practices must meet a further level of refinement as a matter of law was not the subject of *Wards Cove*.

(*i.e.*, data refined by test component and individual minority group) which corroborate the results. *See* note 7, *supra*. Deciding which party's statistical evidence is more persuasive requires the resolution of disputed factual issues at a trial. It is not a matter which merits this Court's preemptive review.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DELLA BAHAN-
BAHAN & ASSOCIATES
128 North Fair Oaks Avenue
Pasadena, California 91103

WALTER KAMIAT
Of Counsel
3003 Van Ness Street, N.W.
Washington, D.C. 20008

DENNIS M. HARLEY
Counsel of Record
510 South Marengo Avenue
Pasadena, California 91101
(626) 796-7555

Attorneys for Respondents

Supreme Court, U.S.
FILED
JAN 28 2003
OFFICE OF THE CLERK

(3)

No. 02-765

IN THE

Supreme Court of the United States

STATE OF CALIFORNIA, CALIFORNIA HIGHWAY PATROL, DWIGHT HELMICK, and EDWARD GOMEZ,

Petitioners,

v.

JEFF D. PAIGE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

BILL LOCKYER
Attorney General of the State of California
SILVIA M. DIAZ
Supervising Deputy Attorney General
300 South Spring Street
Suite 500
Los Angeles, CA 90013

JOEL M. COHN
Counsel of Record
CHARLES L. WARREN
W. RANDOLPH TESLIK, P.C.
AKIN GUMP STRAUSS HAUER & FELD LLP
Robert S. Strauss Building
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 887-4000

WILLIAM A. NORRIS
MICHAEL C. SMALL
AKIN GUMP STRAUSS HAUER & FELD LLP
2029 Century Park East
Suite 2400
Los Angeles, CA 90067

Attorneys for Petitioners

178715

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

15 pp

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
I. The Conflict Between The Ninth Circuit's Decision And This Court's Holdings Cannot Be Avoided On The Grounds That The Propriety Of Using Time-Barred Data Is Solely A Matter Of The Weight To Be Given Such Evidence	2
II. Respondents Cannot Reconcile The Statistical Aggregation Approved By The Ninth Circuit With Prior Decisions Of This Court And The Eleventh Circuit	8
Conclusion	10

TABLE OF CITED AUTHORITIES

Cases:	Page
Bazemore v. Friday, 478 U.S. 385 (1986)	6
Capaci v. Katz & Besthoff, Inc., 711 F.2d 647 (5th Cir. 1983)	9
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)	10
Csicseri v. Bowsher, 862 F. Supp. 547 (D.D.C. 1994), *aff'd*, 67 F.3d 972 (D.C. Cir. 1995)	7
Delaware State College v. Ricks, 449 U.S. 250 (1980)	3-4
Denny v. Westfield State College, 669 F. Supp. 1146 (D. Mass. 1987)	7
Ezell v. Mobile Housing Board, 709 F.2d 1376 (11th Cir. 1983)	8-9
Grant v. Bethlehem Steel Corp., 635 F.2d 1007 (2d Cir. 1980)	7
Hazelwood School District v. United States, 433 U.S. 299 (1977)	1, 5
Maddox v. Claytor, 764 F.2d 1539 (11th Cir. 1985)	8, 10
National R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002)	*passim*

Cited Authorities

	Page
Paxton v. Union National Bank, 688 F.2d 552 (8th Cir. 1982)	9
Payne v. Travenol Labs, Inc., 673 F.2d 798 (5th Cir. 1982)	7
Ste. Marie v. Eastern R.R. Ass'n, 650 F.2d 395 (2d Cir. 1981)	7
United Airlines, Inc. v. Evans, 431 U.S. 553 (1977)	4, 5
United States v. Lee Way Motor Freight, Inc., 625 F.2d 918 (10th Cir. 1979)	7
Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)	1, 8, 9, 10
Wygant v. Jackson Board of Education, 476 U.S. 267 (1986)	10
Statutes:	
42 U.S.C. § 2000e-2(k)(1)(A)	9
42 U.S.C. § 2000e-2(k)(1)(A)(i)	7
Other Authorities:	
David C. Baldus & James W.L. Cole, *Statistical Proof of Discrimination* § 4.12 (1980)	9
Ramona L. Paetzold & Steven L. Willborn, *The Statistics of Discrimination* § 5.08 (2002)	8

Respondent's argument for why the Court should not grant certiorari boils down to the dangerous proposition that plaintiffs should have nearly unfettered leeway in the statistical evidence they may present to a trier of fact in a Title VII disparate impact case. So it is that respondents defend the Ninth Circuit's decision as "unexceptional," notwithstanding the unprecedented and unjustifiable aggregation of statistical data that the decision authorizes – across distinct job categories, across distinct examinations, across distinct racial categories, and stretching back indefinitely in time without regard to the statutory limitations period. After all, respondents claim, the trier of fact can still determine "the relative weight of the parties' competing statistical theories." Op. at 2.

This lax approach to Title VII disparate impact litigation begs the crucial question: As a matter of law, what statistical evidence may a trier of fact properly consider in evaluating a disparate impact claim? The Court has several times recognized the need to police the boundaries of admissible statistical evidence in Title VII cases. *See, e.g.*, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Hazelwood School District v. United States*, 433 U.S. 299 (1977). And, more specifically, the Court has repeatedly admonished, including most recently just last Term in *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), that lower courts in Title VII cases must not use time-barred events to create liability that would not otherwise exist. The Court should grant review here because the Ninth Circuit's decision, far from being "unexceptional," violates the Court's approach to the proof of disparate impact claims, undermines the integrity of disparate impact analysis, and is at odds with the decisions of several courts of appeals.

I. The Conflict Between The Ninth Circuit's Decision And This Court's Holdings Cannot Be Avoided On The Grounds That The Propriety Of Using Time-Barred Data Is Solely A Matter Of The Weight To Be Given Such Evidence

In defending the Ninth Circuit's ruling authorizing the use of pre-liability period data to prove disparate impact within the liability period, respondents characterize the Ninth Circuit's holding as being only that "evidence of statistical trends from outside the limitations period may be used when relevant to understanding employment practices that, because they occurred within the limitations period, are properly subject to challenge." Op. at 4. The Ninth Circuit, however, did not merely approve the use of time-barred data in order to establish "trends" that help to "understand" timely challenged events. The methodology approved by the court combined the results of time-barred examinations with the results of examinations within the liability period, and drew no distinction between the two. The resulting statistical analyses did not in any sense measure the impact of only the timely challenged examinations. Instead, the approved analyses measured the combined impact of all examinations, however distinct and without regard to their timeliness. This methodology did not establish the existence of a "trend" or shed any light on the independent impact of the different examinations within the liability period; it disregarded the legal significance of the liability period entirely.

Nor can the inclusion of pre-liability period data be justified on the grounds that, without such data, meaningful statistical analysis would not be possible. Op. at 5 n.1, 11 n.6. The Ninth Circuit did not base its decision on any alleged insufficiency of liability period data. And contrary to respondents' representation, they *never* even claimed, much less provided evidence to show, that sample sizes within the liability period were too small to

permit meaningful analysis.[1] Notably, even small sample sizes within the liability period could not justify including in statistical analyses the results of examinations that were not timely challenged, affected no decisions within the liability period, and differed in content, application rates, and success rates, from the examinations properly at issue. In these circumstances, statistical analyses including pre-liability period examination results provide no relevant information about the impact of examinations within the liability period, and nothing about the theoretical inadequacy of sample sizes within the liability period can possibly render the use of time-barred examination results any more relevant, or any less a violation of the statutory requirement that allegedly discriminatory selection devices be timely challenged.[2]

Respondents' argument that the Ninth Circuit's ruling authorizing the use of pre-liability period data to prove disparate impact within the liability period does not conflict with the Court's decisions in *Morgan*, *Delaware State College v. Ricks*,

1. Although respondents assert that they submitted evidence, "including expert opinion," that the sample sizes would be too small to permit statistical analysis if limited to data within the limitations period, Op. at 5 n.1, no such evidence appears in the record. The record citation provided by respondents to support their statement contains only their statistical witness's opinion that including data from examinations outside the liability period establishes statistically significant disparities that do not exist if only examinations within the liability period are included. On the other hand, petitioners' statistical expert testified without contradiction that the sample sizes were all large enough to permit meaningful statistical analysis.

2. Respondents are simply wrong in their contention that agreement with petitioners' arguments would prevent analysis of promotional examinations given prior to the beginning of the liability period even when the results of those examinations continued to govern promotions within the liability period. Op. at 11 n.6. Indeed, petitioners performed just such an analysis, which showed no adverse impact against any minority group in any rank. The untimely examinations challenged by petitioners were administered before the liability period and their corresponding eligibility lists also expired before the liability period.

449 U.S. 250 (1980), and *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977), is specious. The Ninth Circuit, which initially relied solely on the continuing violation doctrine to justify its ruling on the use of pre-liability period data, obviously recognized that *Morgan* (which narrowed that doctrine) presented a serious obstacle to using pre-liability period data in the manner plaintiffs sought. That is why, on petition for rehearing in the wake of *Morgan*, the Ninth Circuit deleted its references to the continuing violation doctrine and devised a completely new justification for its use of time-barred data. The court's attempt to recast its decision in evidentiary terms, however, did not change the fact that its ruling permits plaintiffs to use the results of time-barred examinations to prove that timely challenged examinations have a disparate impact, even where the timely examinations, standing alone, show no such impact. In thus permitting time-barred data to serve as a "but for" cause of disparate impact liability, the ruling gives present legal effect to time-barred events in direct contravention of *Morgan*, *Ricks*, and *Evans*.

According to respondents, "[p]etitioners do not assert – and could not assert – that [r]espondents seek relief from time-barred employment decisions: all agree that [r]espondents seek relief only from decisions that occurred during the relevant limitations period and that their suit was timely filed." Op. at 3; *see also id.* at 7-8. The use of pre-liability period data approved by the Ninth Circuit, however, would indeed improperly permit an award of relief based on time-barred events. All respondents can really claim is that they are seeking relief only on behalf of individuals who took examinations that were given during the liability period, and not on behalf of individuals who took only the earlier examinations. But if a finding of adverse impact can be based on statistical analyses that include the results of examinations that were not timely challenged, any award of relief will in fact be based on time-barred decisions, even though the beneficiaries of that relief will not necessarily be the ones who were affected by those decisions.

Respondents also argue that the Ninth Circuit's ruling is supported by the Court's treatment of hostile environment claims in *Morgan*. Op. at 8-9. This argument is particularly disingenuous, because the Court expressly distinguished hostile environment claims from claims based on discrete events, such as promotional examinations, which are capable of independent evaluation. 536 U.S. at 123 ("Hostile environment claims are different in kind from discrete acts. . . . The 'unlawful employment practice' cannot be said to occur on any particular day. . . . [I]n direct contrast to discrete acts, a single act of harassment may not be actionable on its own.").

Respondents further argue that the Court "has never prohibited the use of pre-Act or pre-limitations period data to evaluate the nature of employment practices that occur within the limitations period which are then made the subject of a timely charge by an adversely affected employee." Op. at 10. Respondents' argument is an exercise in misdirection. The Court squarely stated in *Hazelwood School District v. United States*, 433 U.S. 299 (1977), that

> [r]acial discrimination by public employers was not made illegal under Title VII until March 24, 1972. A public employer who from that date forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes.

Id. at 309. Plainly, in *Hazelwood*, the Court was saying it would be improper to base a finding of liability on analyses that included pre-Act data when the evidence showed no discrimination in the post-Act liability period. *Evans* made clear that an event that is not timely challenged is the "legal equivalent" of an event that occurred before Title VII was passed. *Evans*, 431 U.S. at 558. And contrary to the justification offered by the Ninth Circuit, time-barred events cannot once again become actionable merely because they are "similar" to events within the liability period. "[D]iscrete discriminatory acts are

not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Morgan*, 536 U.S. at 122.

Respondents cite *Bazemore v. Friday*, 478 U.S. 385 (1986), as an example of the Court's approval of the use of time-barred data to evaluate the impact of practices within the period. But *Bazemore* by no means endorsed the use of pre-liability period data that the Ninth Circuit approved in this case. *Bazemore* involved a claim of racial discrimination in salaries, and the evidence showed disparities in pay between black and white workers both before and after the date that Title VII became applicable to public employers. A court of appeals had held that, because the salary disparities had originated before the date Title VII became applicable to public employers, the employer had no obligation to eliminate the disparity. The Court disagreed, explaining that

> [a] pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, it is liable under that statute. While recovery may not be permitted for pre-1972 acts of discrimination, to the extent that this discrimination was perpetuated after 1972, liability may be imposed.

478 U.S. at 395. Evidence of pre-Act discrimination was admitted in *Bazemore* to explain the origins of the employer's discriminatory practice and its "ineffectual attempts to eradicate it," not to establish the existence of actionable disparities within the liability period, as the Ninth Circuit did here. *Id.* at 401.

Finally, respondents claim that the Ninth Circuit's decision is "fully consistent" with decisions of other courts of appeals "which have frequently considered pre-limitations period selection data when that evidence is relevant to determining whether the same or similar practices within the limitations period have a disparate impact." Op. at 5. Of the seven cases

cited by respondents to support this statement, none identifies the pre-liability period nature of the statistical evidence as an issue. Two do not appear to have relied on pre-limitations period data at all (*Payne v. Travenol Labs, Inc.*, 673 F.2d 798 (5th Cir. 1982); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918 (10th Cir. 1979)), and three do not contain sufficient information to determine what the limitations period was (*Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007 (2d Cir. 1980); *Csicseri v. Bowsher*, 862 F. Supp. 547 (D.D.C. 1994), *aff'd*, 67 F.3d 972 (D.C. Cir. 1995); *Denny v. Westfield State College*, 669 F. Supp. 1146 (D. Mass. 1987)). In the other two cases, it does not appear that the employer challenged the use of time-barred data, and the decisions therefore provide no meaningful support for the Ninth Circuit's ruling.

Moreover, all but one of the cases cited by respondents involved claims of disparate treatment rather than disparate impact.[3] Unlike disparate impact cases, disparate treatment cases require a showing that the employer intended to discriminate, and the use of pre-liability period events to establish such intent may sometimes be proper. In such circumstances, pre-liability period events are not being used to create a false appearance of statistical disparity within the liability period, but rather to establish knowledge or state of mind during the liability period based in part on conduct before the liability period began. *See* Pet. at 19-21 (circuit conflict with *Ste. Marie v. Eastern R.R. Ass'n*, 650 F.2d 395 (2d Cir. 1981)). In disparate impact cases, on the other hand, the ultimate issue is whether a "particular employment practice" within the liability period causes a disparate impact against a protected group, *see* 42 U.S.C. § 2000e-2(k)(1)(A)(i), and the requirement of particularity precludes using data that does not actually bear on the practice at issue. Here, because each examination is different in content, has different applicant and success rates, and affects

3. Only *Grant v. Bethlehem Steel Corporation* involved a disparate impact claim, but as noted above, that case does not contain sufficient information to determine what the limitations period was.

promotion decisions only for a limited period of time, the results of time-barred examinations cannot even theoretically serve to measure the impact of examinations within the liability period.

II. Respondents Cannot Reconcile The Statistical Aggregation Approved By The Ninth Circuit With Prior Decisions Of This Court And The Eleventh Circuit

Respondents fail to come to grips with petitioners' argument that, by authorizing aggregation of data from different promotional examinations and different ranks into a single pool, the Ninth Circuit's opinion runs afoul of this Court's holding in *Wards Cove*, which requires a separate disparate impact analysis for every job category, "even where workers for the different positions may have somewhat fungible skills." 490 U.S. at 653.

Here again, respondents seek to dull the jarring impact of the Ninth Circuit's decision with the soothing mantra of "don't worry, it's all just a battle of the experts." To this end, respondents cite a host of cases in which courts have let the trier of fact weigh a statistical analysis that used some form of aggregation. Op. at 12-14.

This is a straw man tactic. No one disputes that, under some circumstances, aggregation is a necessary and appropriate statistical tool. The question raised by the Ninth Circuit's ruling is more circumscribed, though still broadly important. Where plaintiffs claim that a specific selection device creates a disparate impact, can plaintiffs prove their case by lumping together data gleaned from different selection devices used to screen for different jobs? And, furthermore, can they do so using the discredited single pool method specifically rejected by the Eleventh Circuit in *Maddox v. Claytor*, 764 F.2d 1539 (11th Cir. 1985)?

The cases respondents cite shed no light on these important issues.[4] The three Court of Appeals decisions, *Ezell v. Mobile*

4. The statistical texts that respondents cite (Op. at 13 n.8) support petitioners' position. For example, in Ramona L. Paetzold & Steven L. Willborn, *The Statistics of Discrimination* § 5.08 & n.4 (2002), the (Cont'd)

Housing Board, 709 F.2d 1376 (11th Cir. 1983); *Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647 (5th Cir. 1983); and *Paxton v. Union National Bank*, 688 F.2d 552 (8th Cir. 1982), all pre-date *Wards Cove*, where the Court clarified the standards for statistical aggregation in disparate impact cases. Thus, any analysis they contain at odds with that decision is necessarily obsolete. In any event, in *Capaci*, the statistical analysis did not aggregate across different job positions or different tests (as the Ninth Circuit authorizes here). Rather, that analysis dealt with selection to a single position (manager trainee) – a position for which no tests were used. *Capaci*, 711 F.2d at 651-56. Neither *Ezell* nor *Paxton* contain a holding on the relevant issue whether aggregated data from distinct examinations given across multiple job categories can be used to prove a disparate impact claim. *Ezell*, 709 F.2d at 1382; *Paxton*, 688 F.2d at 556 n.3. To the extent that both cases rely to some extent on aggregated statistics across job categories, they do so in the very different context of proving a disparate treatment claim (where the defendant's discriminatory intent is an element).

In short, respondents provide no meaningful defense of the Ninth Circuit's approved method of aggregations by which, for example, plaintiffs may prove disparate impact by combining

(Cont'd)
authors expressly distinguish between simple "aggregation" (the method approved by the Ninth Circuit) and statistically combining data across meaningful strata using an appropriate statistical method, noting that the former can create "statistical anomalies" and "can sometimes yield numbers that create an inference of disparate impact . . . in situations where, because data have been improperly aggregated across strata, the inference is questionable." In David C. Baldus & James W.L. Cole, *Statistical Proof of Discrimination* § 4.12 (1980), the authors discuss the appropriateness of combining multiple "stages" of a single selection process in order to evaluate the impact of the entire process, not applications of different processes. Not only is this discussion irrelevant to the kind of aggregation that the Ninth Circuit approved here, it is arguably rendered inapplicable by the amendment of Title VII in 1991 to require identification of the specific employment practice responsible for any disparity. *See* 42 U.S.C. § 2000e-2(k)(1)(A).

the results of the "in-box" examination used to screen candidates for the rank of captain with the multiple choice examination used for promotion to sergeant. As explained in the petition at 22-25, this kind of aggregation, by combining unrelated tests for distinct job categories, is guaranteed to create irrational results, circumvents the statutory requirement that plaintiffs show that a "particular employment practice" causes a disparate impact, and is contrary to established statistical standards.

Such aggregation, moreover, creates exactly the problem identified in *Wards Cove* – a decision respondents scarcely mention. In a solitary footnote, they seem to suggest that, so long as a plaintiff challenges a specific employment practice, *Wards Cove* permits a plaintiff to show disparate impact using statistics from a set of totally separate employment practices. Op. at 14 n.9. Respondents do not explain how that assertion squares with *Wards Cove* generally or, more specifically, its admonition that "[r]acial imbalance in one segment of an employer's work force does not, without more, establish a prima facie case of disparate impact with respect to the selection of workers for the employer's other positions." 490 U.S. at 653.

Finally, respondents do not even address either the circuit split created by the Ninth Circuit's endorsement of the "single pool" method of aggregation, *see Maddox v. Claytor*, 764 F.2d 1539 (11th Cir. 1985), or petitioners' argument that the lumping of all minority groups into a single statistical category is at odds with the Court's decisions in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). Nor is there an effective rejoinder to either point.

CONCLUSION

For the last nine years, this case has been litigated on the basis of one inappropriate statistical theory after another. In the absence of Supreme Court review, the Ninth Circuit decision will perpetuate the injustice in the current case and will consign future cases to a similar fate. We respectfully request that the Court grant the Petition for Certiorari.

Respectfully submitted,

JOEL M. COHN
Counsel of Record
CHARLES L. WARREN
W. RANDOLPH TESLIK, P.C.
AKIN GUMP STRAUSS HAUER
& FELD LLP
Robert S. Strauss Building
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 887-4000

WILLIAM A. NORRIS
MICHAEL C. SMALL
AKIN GUMP STRAUSS HAUER
& FELD LLP
2029 Century Park East
Suite 2400
Los Angeles, CA 90067

BILL LOCKYER
Attorney General of the
State of California
SILVIA M. DIAZ
Supervising Deputy
Attorney General
300 South Spring Street
Suite 500
Los Angeles, CA 90013

Attorneys for Petitioners